LIBRARY
SUPREME COURT, U. S.

FILED
MAR 1 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1416

CANEL LODGE NO. 700, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner,

v.

UNITED AIRCRAFT CORPORATION, *Respondent.*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PLATO E. PAPPS
Machinists Building
Washington, D. C. 20036

MOZART G. RATNER
818 Eighteenth Street, N. W.
Washington, D. C. 20006

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Decision of the Court Below, December 11, 1970	2a
Memorandum Decision of the District Court, June 17, 1970	7a
Order of District Court, June 24, 1970	21a
Amendment to Memorandum Decision of District Court, June 24, 1970	22a
Letter from Regional Director, First Region, National Labor Relations Board, to Joseph C. Wells, Esq., December 10, 1968	23a
Letter, from Regional Director, First Region, National Labor Relations Board, to Joseph C. Wells, Esq., April 22, 1969, refusing to issue complaint	25a
Letter, from General Counsel, National Labor Relations Board, to Joseph C. Wells, Esq., July 15, 1969, denying appeal	26a
Excerpts From Decision of NLRB in United Aircraft Corporation and Lodges 1746 and 700, IAMAW, AFL-CIO, 180 NLRB No. 49, p. 2, n. 2, Case No. 1-CA-6475, et al.	28a
Excerpts From Decision of Trial Examiner in NLRB No. 1-CA-6475, et al., pp. 21-22	28a
Order of Trial Examiner Staying Further Action in Case No. 1-CA-6967, dated May 15, 1970	34a
Telegraphic Ruling of NLRB granting General Counsel's and Charging Party's Request for Appeal and directing Trial Examiner to proceed, dated Jue 3, 1970	37a
Trial Examiner's Ruling on Motion to Defer Action, dated June 24, 1970	37a
Telegraphic Ruling of NLRB directing Trial Examiner to decide and issue decision, ...	39a
Trial Examiner's Decision, Case No. 1-CA-6967, dated July 13, 1970	40a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

CANEL LODGE NO. 700, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner,

v.

UNITED AIRCRAFT CORPORATION, *Respondent.*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 227—September Term, 1970

(Argued November 17, 1970 Decided December 11, 1970.)

Docket No. 35119

UNITED AIRCRAFT CORPORATION,
Plaintiff-Appellee,

v.

CANEL LODGE No. 700, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Defendant-Appellant.

Before:

KAUFMAN, HAYS and GIBBONS,*
Circuit Judges.

Appeal from an order of the United States District Court for the District of Connecticut, Clarie, *J.*, which directed the appellant labor union to proceed to arbitration pursuant to the terms of a collective bargaining agreement.

Affirmed.

PLATO E. PAPPS and MOZART G. RATNER, Washington, D. C., *for Appellant.*

JOSEPH C. WELLS, Washington, D. C., *for Appellee.*

GIBBONS, *Circuit Judge*:

Plaintiff-appellee, United Aircraft Corporation (the Company), petitioned the district court for an order directing the defendant-appellant, Canel Lodge No. 700, International Association of Machinists and Aerospace Workers, AFL-CIO (the Union), to proceed to arbitration pursuant

* Of the United States Court of Appeals for the Third Circuit, sitting by designation.

to the terms of a collective bargaining agreement executed between the Company and the Union on December 5, 1968. That agreement contains a comprehensive grievance procedure and lists thirty-nine types of grievances which shall, if not resolved in one of four grievance steps, be submitted to arbitration. Among those grievances which must be submitted to arbitration upon the request of either party is:

> "1. A grievance concerning the discharge or disciplinary suspension of an employee."

Also relevant to this case are these additional contract provisions:

> "Article IV
>
> Non-Discrimination
>
> The company and the union recognize that employees covered by this agreement may not be discriminated against because of race, color, sex, age, or religious belief, nor because they engage in activities which are protected by the National Labor Relations Act, as amended.
>
> Both the company and the union recognize that employees covered by this agreement have the right to become or remain members of the union or to refuse to become or remain members of the union without being subject to restraint or coercion from either the company or the union because of their exercise of this right.
>
> There shall be no solicitation of employees for union membership or dues conducted upon the premises of the company during working hours by the union, its representatives or by employees.
>
> • • •
>
> Appendix A
>
> Section 1. The union shall assume all responsibility for the distribution and collection of payroll deduction

assignment cards for union dues and the initiation fee, and agrees that such distribution and collection will not be carried on during working hours on company premises."

The contract provides for dues check off from the pay of those union members who have executed payroll assignment cards. It expressly recognizes that the grievance and arbitration procedures are available to employees, to the Union, and to the Company.

An employee, Tobin, a Union shop steward, was suspended by the Company for one day on December 30, 1969, as a disciplinary punishment for his alleged violation on December 15, 1969, of Company rules which limited employees' rights to distribute or collect payroll assignment cards for dues check off. Neither the employee nor the Union made any attempt to bring this suspension into the grievance procedure. Instead, after the time had expired within which under the contract the employee could appeal his suspension through the grivance procedure, the Union filed a charge with the National Labor Relations Board (the Board). This charge alleged that Tobin's disciplinary suspension was a pretext, an interference with rights guaranteed in Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1964), and a violation of Section 8(a)(1)(3) and (5) of the Act.

When it learned of the unfair labor practice charge the Company filed a grievance concerning Tobin's suspension, contending that it was for violating the rule against working hours solicitation of assignment cards. The Union declined to discuss the grievance and refused to participate in contract arbitration. It contended that because the General Counsel of the Board issued a complaint after investigation of its unfair labor practice charge, the contract arbitration procedure was inapplicable. The Company then filed the instant petition under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (1964),

seeking an order directing the Union to proceed to arbitration. The district court entered such an order on June 24, 1970, from which order the Union appeals.

While this action was pending in the district court, the Company moved before the Board Trial Examiner to stay the Board proceedings, pending disposition of the lawsuit. The Trial Examiner granted the motion. The General Counsel and the Union then filed a special appeal to the Board, which on June 3, 1970, reversed the Trial Examiner and directed him to proceed with a decision on the merits of the unfair labor practice charge. Thus at this juncture the dispute over Tobin's suspension is being litigated before the Board and, pursuant to the district court order, by contract arbitration.

The Union's chief contention is that the dispute over Tobin's suspension does not fall within the arbitration provisions of the contract. The district court found that the Company had presented a grievance cognizable under those provisions, and we agree. The Union argues that the dispute is over Tobin's disciplinary suspension, not over Tobin's alleged breach of the Company's rule and his alleged breach of the no solicitation clause in the contract. Only by a completely strained reading of the contract and a completely unrealistic definition of the dispute could the Court arrive at such a conclusion. Our duty is to order arbitration where under any reasonable construction the contract would cover the grievance, not to strain for unreasonable constructions. *International Union of Electrical Workers* v. *General Electric Co.*, 407 F.2d 253, 256 (2 Cir. 1968).

Next the Union contends that if the agreement, properly interpreted, makes subject to arbitration alleged Company conduct which would be an unfair labor practice, such an agreement is unenforceable as against public policy, because it permits the arbitrator to invade the province of the Board. That contention has long since been foreclosed.

N.L.R.B. v. *Strong*, 393 U.S. 357 (1969); *N.L.R.B.* v. *C. & C. Plywood Corp.*, 385 U.S. 421 (1967); *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261, 268 (1964); *Smith* v. *Evening News Ass'n*, 371 U.S. 195, 197-198 (1962); *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U.S. 95, 101 n. 9 (1962). In the words of the Supreme Court, ". . . the authority of the Board and the law of the contracts are overlapping concurrent regimes, neither pre-empting the other." *N.L.R.B.* v. *Strong, supra* at 360.

Indeed upon occasion the Board in exercising its concurrent statutory jurisdiction will defer to an arbitrator's award upholding discipline against employees, rather than adjudicating the employee's 8(a)(3) charge on the merits. See, e.g., *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955) and discussion in *Office Employees Local 425* v. *N.L.R.B.*, 419 F.2d 314, 317-320 (D.C. Cir. 1969). The possibility of such deferral by the Board is the basis for the Union's final contention, that the existence of concurrent jurisdiction coupled with the possibility of deferral by the Board, may in some cases deprive the Union of any advantage which might be gained by its choice of a forum. It is clear that an employer may not resist contract arbitration on the ground that it prefers the Board as a forum *Carey* v. *Westinghouse Electric Corp., supra* at 268; *Smith* v. *Evening News Ass'n, supra.* We perceive no compelling reason why a Union which has executed an arbitration agreement should be in a more favorable forum shopping position. The Union argues that the district court has exacted a price for its resort to the processes of the National Labor Relations Act before the Board, in that it is being forced simultaneously to arbitrate. This argument is specious, for the court had nothing to do with the execution of the collective bargaining agreement in which the Union undertook to arbitrate. Where there is such an agreement there is concurrent contract and Board jurisdiction.

This case does not present as issues when or to what extent the Board should defer to an arbitrator's decision,

nor does it present as an issue when the Board should postpone its own proceeding until the conclusion of contract arbitration. See *Dubo Mfg. Co.*, 142 N.L.R.B. 431 (1963). It presents only the propriety of the district court's order enforcing an arbitration agreement at a time when a dispute arising out of the same facts is pending before the Board. That order was proper, and it will be affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No. 13,760

UNITED AIRCRAFT CORPORATION, *Petitioner*,

v.

CANEL LODGE NO. 700, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *Respondent*.

Memorandum of Decision

The plaintiff-employer, United Aircraft Corporation, (Company), brought this equitable action to compel the arbitration of a grievance arising out of the administration of a collective bargaining contract[1] with Canel Lodge No. 700, International Association of Machinists and Aerospace Workers, (Union). Jurisdiction of the subject matter exists pursuant to § 301 of the Labor Management Relations Act of 1947, 61 Stat. 1956, 29 U.S.C. § 185. The pleadings, affidavits and exhibits, together with counsels' oral representations to the Court disclose that there remain no factual issues to be litigated. The plaintiff-company has presented a grievance between the parties cognizable within the terms of the existing collective bargaining agreement; one which creates a contractual duty on the part of the Union to arbitrate.

---

[1] Plaintiff's Exhibit "A".

Facts

Tobin, a Union shop steward, was suspended by the Company for one day, on December 30, 1969, as a disciplinary punishment for his alleged violation, on December 15, 1969, of Company rules, which limited employees' rights to distribute or collect Union "check off cards" during working hours.[2] Neither Tobin nor the Union filed any grievance under the terms of the labor contract arising out of the Company's action, although Article VII, § 1, 3(a)(1) thereof, authorized them to do so. Section 10 of said contract provides that such an employee's right to appeal his discharge or suspension is conditioned upon his filing such grievance within five (5) working days from the date of the occurrence thereof. However, in this instance, after the five days had expired and the employee's grievance remedy under the contract was foreclosed, the Union filed an unfair labor practice charge with the National Labor Relations Board (NLRB) on January 6, 1970, alleging that the Company's action violated Tobin's statutory right under §§ 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (3), to be free from Company discrimination.

The plaintiff-employer asserts that the labor agreement specifically provides for a grievance procedure, which was designed to promote the settlement of disputes between the employer, the Union and the Union membership. It points specifically to Article VII, § 1, which provides:

> "In the event that a difference arises between the company, the union or any employee concerning the

---

[2] Agreement with Lodge 700, International Association of Machinitsts, Article IV. (Para. 3) provides:

> "There shall be no solicitation of employees for union membership or dues conducted upon the premises of the company during working hours by the union, its representatives or by employees."

interpretation, application or compliance with the provisions of this agreement, an earnest effort will be made to resolve such difference in accordance with the following procedure which *must* be followed." (Emphasis added).

While the contract provides for four steps in the ordinary procedure for processing individual employee grievances, it permits the Company or the Union to institute a grievance at the third step. Only where the dispute cannot be settled at the fourth step and within the list of grievances listed in Article VII, § 3 is it provided that the matter shall be submitted to arbitration.[3] It further provides that the arbitrator's decision, supported by substantial evidence, shall be final and conclusive and binding upon all employees, the Company and the Union.

As soon as the plaintiff-employer first became aware of the defendant's pending labor board charge, it promptly wrote to the Union, on January 13, 1970, requesting that the dispute concerning Tobin's suspension be placed in the grievance procedure at the third step.[4] When the Union refused to consider the matter on these terms,[5] the Company, on January 19, 1970, sought to place the matter in the grievance procedure at the fourth step.[6] The Union reiterated its position by letter dated January 26, 1970, and advised the Company that it would not

---

[3] Article VII., Section 3 provides in part:

"(a) The following grievances, if not settled at Step 4 of Section 1 of this Article, shall be submitted to arbitration upon the request of either party hereto filed in accordance with the provisions of this Article.

'1. A grievance concerning the discharge or disciplinary suspension of an employee.' "

[4] Plaintiff's Exhibit "B".

[5] Plaintiff's Exhibit "C1".

[6] Plaintiff's Exhibit "C2".

consider "Tobin's suspension" at any step of the grievance procedure.[7] Thereupon, the plaintiff-employer, on January 29, 1970, requested, in writing, that the dispute be submitted to arbitration pursuant to the collective bargaining contract.[8] The Union rejected plaintiff's request on the grounds that Tobin's suspension was not a grievance for arbitration, because it did not involve the interpretation, application or compliance with the provisions of the agreement; but rather that it posed a question relating to the construction and application of a governing federal statute.[9] The plaintiff thereupon filed the present court action in an effort to compel arbitration under the collective bargaining contract.

Meanwhile, the General Counsel of the NLRB issued a complaint against the Company. The respondent moved to stay further action at the hearing before the Trial Examiner pending the outcome of this action. The Examiner reserved his ruling on the motion and testimony was taken on a provisional basis. On May 15, 1970, he entered an order in Case No. 1-CA-6967, withholding any further action pending the outcome of this suit and included the following pertinent observation:

> "(T)his dispute over one-day's suspension of an employee is now engaging the attention of a Board Trial Examiner and a federal court, and, if it takes the same course as other litigation between the same parties, this dispute will ultimately require consideration by Board members and a federal appellate court, and will consume untold man-hours of their time as well as of the time of Board staff members and of the staff of the General Counsel, in addition to the time already spent thereon. . . .

---

[7] Plaintiff's Exhibit "C4".

[8] Plaintiff's Exhibit "E".

[9] Plaintiff's Exhibit "F".

"It is true that more is involved here than one day's backpay for one man. If Respondent is ultimately found to have discriminated against Tobin, the conventional remedy would include a requirement that it post a notice promising not to discriminate against employees for Union activity. However, the Board has recently issued two decisions finding that Respondent discharged or suspended a number of employees, including union stewards, for Union activity and requiring it to post at various of its plants, including the one here involved, notices abjuring any future resort to such conduct. Petitions for review of both those cases are pending before the Court of Appeals for the Second Circuit. If the Board prevails in either of these cases, an appropriate notice will have to be posted by Respondent, which will presumably cure the coercive effect of any past discrimination, including that here involved."

"It is clear, therefore, that apart from compensating Tobin for loss of one day's pay, little, if anything, will be gained by the inordinate expenditure of money and time required to process this matter further. In view of this, it may be too much to hope that the parties, with the help of their exceptionally able counsel, will devise some formula for disposing of this matter without further litigation." (See Petitioner's Motion to Lodge).

The General Counsel thereupon appealed the Trial Examiner's ruling and represented to the Board that the Company had been recently involved in many alleged discriminatory and unfair labor practices of a similar kind and that in the light of past history the Trial Examiner's recommendations were unrealistic. He contended that the outcome of the Court proceeding to compel arbitration was irrelevant, because the Board would, in the circum-

stances of this case, assert jurisdiction with or without concurrent arbitration.

On June 3, 1970, the Board granted the General Counsel's appeal, reversed the Trial Examiner's ruling staying the proceedings and directed him to proceed forthwith with his decision on the merits of the proceeding. (See Respondent's Motion to Lodge).

DISCUSSION

Labor arbitration law, still in its formative stages, has not dogmatically defined the areas and circumstances under which contractual arbitration directed in the bargaining agreement shall be given free reign to function. The fluid development of this phase of labor law is succinctly described in the words of Justice Harlan in his concurring opinion in *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 273 (1964), wherein he said:

> "As is recognized by all, neither position in this case is without its difficulties. Lacking a clear-cut command in the statute itself, the choice in substance lies between a course which would altogether preclude any attempt at resolving disputes of this kind by arbitration, and one which at worst will expose those concerned to the hazard of duplicative proceedings. The undesirable consequences of the first alternative are inevitable, those of the second conjectural. As between the two, I think the Court at this early stage of experience in this area rightly chooses the latter."

Not every controversy arising out of a collective bargaining contract can be validly described as a statutory unfair labor practice. However, occasions often do develop where the questioned conduct giving rise to the dispute takes on a dual aspect. This ordinarily occurs when the challenged acts creating the dispute are so intertwined with statutory and contractual controls as to cause them to be-

come almost indistinguishable in their origin. Thus, where a claim may not be factually sustainable under strict contractual terms, the Company's conduct may sometimes be described as a pretext to an overall continuing program of discriminatory unfair labor practices. The Court must fashion a workable procedure, which will not only encourage respect for the terms of the labor contract by enforcing promptly executed arbitration procedures, but at the same time it must be sensitive to carrying out the protective purposes of the federal statutory law against discrimination and unfair labor practices.

> "The strong reliance upon arbitration as a means of peacefully and expeditiously resolving labor disputes, evidenced in the drafting of section 301 and its interpretation by the Supreme Court, see e.g., Textile Workers Union v. Lincoln Mills, 353 U.S. 448 . . . might be immeasurably frustrated were it within the power of a recalcitrant party to assert that his conduct, alleged to be a breach of contract, is also an unfair labor practice and within the sole domain of the NLRB; almost any breach of a collective bargaining agreement could successfully be garbed as an unfair labor practice . . . . (A)ll of these factors are incompatible with an assertion that courts or arbitrators must necessarily be deprived of jurisdiction over disputes which in some form or other trench upon the possible, but as yet unexercised, use of power by the National Labor Relations Board." *Carey* v. *General Electric Company,* 315 F.2d 499, 509 (2 Cir. 1963).

Here the respondent Union, through its counsel, openly asserts that it intentionally waived the employee's right to use the contractual grievance procedures afforded under the labor contract, by deliberately permitting the expiration of the five-day limitation period, and then filing a formal complaint with the NLRB. The Union stresses that since

the employee, Tobin, is the only person aggrieved by the alleged unlawful suspension, no grievance exists on which the Company might assert a right to arbitration. It suggests that the only aggrievement the Company might allege is that the Union chose to exercise its statutory right to file a complaint with the Board; and, since the filing period for the employee's grievance has expired, the same contractual time for the limitation bars the Company from claiming a grievance under Article VII, § 1, step 3(b). Finally, the Union points to the transcript of the contract negotiation sessions relating to grievance procedures, to demonstrate that the parties never agreed to bargain and negotiate all employee complaints affecting working conditions[10] and at no time intended to forego its statutory rights to file charges covering any grievance within the jurisdiction of the NLRB.

It has long been recognized that the statutory right to resort to the Board for relief against unfair labor practices cannot be foreclosed by private contract.

> "These decisions are based on the express language of § 10(a) of the National Labor Relations Act, 29 U.S.C. § 160(a), which provides in part:
>
> > 'The Board is empowered * * * to prevent any person from engaging in any unfair labor practice * * * affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *.'
>
> "This express statutory mandate, in turn, reflects the theory enunciated by the Supreme Court in the National Licorice Co. v. N.L.R.B.: 'The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices.' 309 U.S. at 364, 60 S.Ct. at 577. This

[10] Defendant's Exhibits "Q(1)", "Q(2)", "Q(3)", and "R".

public interest in preventing unfair labor practices cannot be entirely foreclosed by a purely private arrangement, no matter how attractive the arrangement may appear to be to the individual participants." *Lodge 743, Int. Ass'n. of Mach.* v. *United Aircraft Corp.*, 337 F.2d 5, 8-9 (2 Cir. 1964). See *Dubo Mfg. Co.*, 142 N.L.R.B. 431, 53 L.R.R.M. 1070.

If the Union's present approach to this dispute were tenable, it would mean that the Union in its exclusive discretion could evade, at will, the contract arbitration process by deliberately refraining from submitting the alleged grievance within the five (5) day limitation period and then filing its complaint with the Board. Such unilateral action on the part of the Union, if permissible, would totally destroy the mutuality of the substantive terms of the labor agreement on this very important and basic contractual consideration.

"Clearly employers will be wary of assuming obligations to arbitrate specifically enforceable against them when no similarly efficacious remedy is available to enforce the concommitant undertaking of the union to refrain from striking." *Boys Markets* v. *Clerk's Union*, 38 U.S.L.W. 4462 (U.S. June 1, 1970).

In an analogous situation, the employee-plaintiffs alleged job discrimination pursuant to a civil rights statutory remedy, where grievances were subject to an arbitration clause in the collective bargaining contract; in that instance, the court unequivocally stated:

"The situation facing the trial court was one in which there exists concurrent jurisdiction under the statutory scheme and under the grievance and arbitration process for the resolution of claims against an employer and a union. The analogy to labor disputes involving con-

current jurisdiction of the N.L.R.B. and the arbitration process is not merely compelling, we hold it conclusive.

> "While we recognize that there is a burden placed on the defendant who must defend in two different fora, we also note that there may be crucial differences between the two processes and the remedy afforded by each. Also, as with unfair labor practice cases, in a case involving an alleged breach of a contract brought before an arbitrator, the arbitrator may consider himself bound to apply the contract and not give the types of remedy which are available under the statute. Conversely, an action in court may not be able to delve into all the ramifications of the contract nor afford some types of relief available through arbitration . . . ." *Bowe* v. *Colgate-Palmolive Company,* 416 F.2d 711, 714-15 (7 Cir. 1969). See *NLRB* v. *Acme Industrial Co.,* 385 U.S. 432, 437-439 (1967).

The Union asserts that this is not a case where "a difference arises between the Company, the Union or any employee concerning the interpretation, application or compliance with the provisions of this agreement," controlled by Article VII, § 1 of the contract. It contends that even if arbitration were resorted to, it could not be expected to effectively dispose of the basic issues in dispute. Whether or not the time period had elapsed for the Company to assert its claim to arbitrate, or what the facts disclosed at such a hearing might reveal, are all matters properly to be decided by the named arbiters pursuant to Article VII, § 3(g) of the contract. The arbitration process will not preclude or otherwise limit the Union's right to simultaneously process its statutory grievance before the NLRB. It shall be the Board's prerogative, depending upon the facts and circumstance of the particular case, to exercise its discretion to either refrain from conducting a parallel investigation and hearing pending the arbiter's findings, or if the facts warrant, to proceed forthwith to a prompt

adjudication and enforcement consistent with its statutory responsibilities.

> "Proceeding with the arbitration will not disrupt or interfere with the Labor Board case .... So far as cost or inconvenience of producing like or similar evidence before the arbiter is concerned, no policy defined in the Labor Act affords any immunity to the parties to an arbitration agreement. . . . Actually, there are quite separate rights involving separate legal and factual issues. In the arbitration proceeding, the Union is seeking to enforce the contractual right of employees not to be discharged 'unjustly'. On the other hand, what is at issue in the Labor Board proceeding is the statutory rights of employees not to be discharged because of their union membership or because of anti-union discriminatory purposes on the employer's part." *United Steelworkers* v. *American Internat'l. Aluminum Corp.*, 334 F.2d 147, 152 (5 Cir. 1964).

The mere fact that the plaintiff-employer here suspended the employee without simultaneously filing a grievance does not preclude the latter from requesting arbitration. Article VII, § 6 of the agreement clearly defines this time limitation as affecting only the employee's right to file such a grievance and it vests in the employer the discretion to waive the time limitation for a satisfactory reason.

> "(T)he court's function is limited to determining whether there is any reasonable construction of the arbitration clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it. Under the *Steelworkers* doctrine:
>
> > 'Apart from matters that the parties specifically exclude, all of the questions on which the parties dis-

agree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement.'

* * * * * *

'An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.' *Warrior & Gulf,* 363 U.S. at 581, 582-583, 80 S.Ct. at 1352." *International U. of E., R. & M. Wkrs.* v. *General Electric Co.,* 407 F.2d 253, 256 (2 Cir. 1968).

The respondent Union represents that the case of *Old Dutch Farms, Inc.* v. *Milk Drivers & Dairy Emp. Union,* 359 F.2d 598 (2 Cir. 1966), is controlling and dispositive of the issue raised, however, the Court is not persuaded. In that case, the court distinguished between contract actions brought under § 301(a), where the subject matter has been traditionally within the province of arbitration, as compared with tort claims filed under § 303. It pointed out that the latter group requires an explicit statement directing arbitration otherwise they are peculiarly suited for judicial interpretation. See *Vaca* v. *Sipes,* 386 U.S. 171, 179 (1967); *Twin Excavating Co.* v. *Local Union 731, Excavating, Etc.,* 337 F.2d 437 (7 Cir. 1964); *Silvercup Bakers, Inc.* v. *Fink Baking Corp.,* 273 F. Supp. 159 (1967).

Tobin's conduct unquestionably created friction in the normal employer-employee relationship under the contract. If the claimed conduct violated Article IV of the collective bargaining agreement,[11] then a grievable dispute existed, which was subject to the Grievance Procedure under Article VII. When the Union filed the charges against the

---

[11] See note 2, *supra.*

employer, the latter became alerted for the first time that the Union formally regarded the employer's action as unjustifiable. It is for one of the arbitrators named in the agreement to hear the facts and make his findings.

> "Whether or not the Union's demands have merit will be determined by the arbitrator in light of the fully developed facts. It is sufficient for present purposes that the demands are not so plainly unreasonable that the subject matter of the dispute must be regarded as non-arbitrable because it can be seen in advance that no award to the Union could receive judicial sanction." *John Wiley & Sons* v. *Livingston,* 376 U.S. 543, 555 (1964).

> "Doubt whether grievance procedures or some part of them apply to a particular dispute, whether such procedures have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration." *Id.* at 557.

It is a commonly accepted precept that labor-management frictions and misunderstandings should be recognized and treated early in their origin. It is then that problems are of manageable size and subject to remedial measures, with a minimal harm and scarring to the participants. Courts have thus encouraged the principals in collective bargaining agreements to create a forum of their own, wherein such disputes can promptly be resolved. The present dispute has created a grievance between the parties. Arbitration will determine whether or not the employee's conduct was justified under the terms of the contract. Arbitration will not in any manner frustrate, invade or otherwise interfere with the NLRB's action relating to the Union's charge of unfair labor practice under the statute. While the Court's

recognition of contractual arbitration may provide some duplicity in this case, it will generally encourage the prompt utilization of this facility by both parties except where statutory relief is required to eliminate a course of unlawful conduct.

The Court finds that the plaintiff has presented a grievance cognizable within the terms of the labor agreement; and the Union has a contractual duty to arbitrate the same. The parties shall within five (5) days submit an appropriate order to the Court. So ORDERED.

The foregoing opinion shall constitute the findings of fact and conclusions of law required to be filed by the Court pursuant to Rule 52(a), Fed. R. Civ. P.

Dated at Hartford, Connecticut, this 17th day of June, 1970.

/s/ T. EMMET CLARIE
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No. 13,760

[Caption Omitted]

Order

The Court, having found and concluded in its Memorandum of Decision dated June 17, 1970, that United Aircraft Corporation had presented a grievance cognizable within the terms of the current collective bargaining agreement between it and Canel Lodge No. 700, International Association of Machinists and Aerospace Workers, AFL-CIO; that the said Union has a contractual duty under the said agreement to arbitrate the aforesaid grievance; and that the said Union nevertheless has refused the Company's request so to arbitrate, hereby issues its order as follows:

ORDERED, that Canel Lodge No. 700, International Association of Machinists and Aerospace Workers, AFL-CIO, submit to arbitration, not later than ten (10) days following the date of this Order, the grievance filed by United Aircraft Corporation with respect to the suspension of employee Theodore Tobin as requested by United Aircraft Corporation on January 29, 1970, as it relates to Article IV and Appendix A, Section 1 of the collective bargaining agreement.

Dated at Hartford, Connecticut, this 24th day of June, 1970.

/s/ T. EMMET CLARIE
United States District Judge

• • • • • • • • • • •

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil Action No. 13,760

[Caption Omitted]

Amendment to Memorandum of Decision

The Court's Memorandum of Decision in the above entitled matter, filed June 18, 1970, is hereby amended and corrected as follows:

1. On page 12 of the Memorandum, the second sentence of the second paragraph is amended to read:

> "If the claimed conduct violated Article IV or Appendix A, Section 1, of the collective bargaining agreement,[11] then a grievable dispute existed, which was subject to the Grievance Procedure under Article VII."

2. Footnote 2 is amended by adding:

Appendix A, Section 1 provides:

"The union shall assume all responsibility for the distribution and collection of payroll deduction assignment cards for union dues and the initiation fee, and agrees that such distribution and collection will not be carried on during working hours on company premises."

So Ordered.

Dated at Hartford, Connecticut, this 24th day of June, 1970.

/s/ T. Emmet Clarie
United States District Judge

* * * * * * * * * *

NATIONAL LABOR RELATIONS BOARD

REGION 1

John F. Kennedy Federal Building
Boston, Massachusetts 02203
Telephone 223-3300

December 10, 1968

Joseph C. Wells, Esquire
1225 Connecticut Avenue, N. W.
Washington, D. C. 20036

Re: Industrial Aircraft Lodge No. 1746 and Canel Lodge No. 700, International Association of Machinists and Aerospace Workers, AFL-CIO (United Aircraft Corporation, Pratt & Whitney Aircraft Division) Case No. 1-CB-1429

Dear Sir:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

It does not appear that further proceedings on the charge are warranted inasmuch as the disputes alluded to in the instant charge filed by you are alleged in charges filed by the Unions to involve violations of Sec. 8(a) of the Act. There is no mandatory obligation to bargain as to these alleged violations of the Act. Therefore, no violation of Sec. 8(b)(3) is found in the Union's refusal to file grievances or otherwise to bargain collectively concerning the disciplinary actions against employees referred to in your charge. I am, therefore, refusing to issue a complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel of the Na-

tional Labor Relations Board, Washington, D. C. 20570, and a copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D. C., by the close of business on December 23, 1968. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. A copy of any such request for extention of time should be submitted to me.

Very truly yours,

ALBERT J. HOBAN
Albert J. Hoban
Regional Director

Certified No. 614801
Return Receipt Requested

* * * * * * * * * *

[Distribution List Omitted]

NATIONAL LABOR RELATIONS BOARD

REGION 1

John F. Kennedy Federal Building
Boston, Massachusetts 02203
Telephone 223-3300

April 22, 1969

Joseph C. Wells, Esquire
1225 Connecticut Avenue, N. W.
Washington, D. C. 20036

Re: Industrial Aircraft Lodge No. 1746, International Association of Machinists and Aerospace Workers, AFL-CIO (United Aircraft Corporation, Pratt & Whitney Aircraft Division) Case No. 1-CB-1474

Dear Sir:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

It does not appear that further proceedings on the charge are warranted inasmuch as the Employer's grievance pertained to the discharge of an employee alleged by the Union as having been in violation of Sec. 8(a)(3), a matter now pending before a Trial Examiner. Essentially the same issue was presented in Case No. 1-CB-1429 and the fact that the Employer, herein, filed a grievance under the contract was not considered to require a disposition different from that in the earlier case. I am, therefore, refusing to issue a complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, you may obtain a review of this action by filing an appeal with the General Counsel of the National Labor Relations Board, Washington, D. C. 20570, and a

copy with me. This appeal must contain a complete statement setting forth the facts and reasons upon which it is based. The appeal must be received by the General Counsel in Washington, D. C., by the close of business on May 5, 1969. Upon good cause shown, however, the General Counsel may grant special permission for a longer period within which to file. A copy of any such request for extension of time should be submitted to me.

Very truly yours,

ALBERT J. HOBAN
Albert J. Hoban
Regional Director

Certified No. 614846
Return Receipt Requested

* * * * * * * * * *

[Distribution List Omitted]

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL

Washington, D. C. 20570

July 15, 1969

Re: Industrial Aircraft Lodge No. 1746 International Association of Machinists and Aerospace Workers, AFL-CIO (United Aircraft Corporation, Pratt & Whitney Aircraft Division) Case No. 1-CB-1474

Joseph C. Wells, Esq.
1225 Connecticut Avenue, N. W.
Washington, D. C. 20036

Dear Mr. Wells:

Your appeal from the refusal to issue complaint in the captioned case, charging violations under Section 8 of the National Labor Relations Act, has been duly considered.

The appeal is denied. In the absence of a strike or other economic pressure by the Union, the Company could have been "aggrieved" only by the Union's resort to Board processes, which Section 10(a) of the Act keeps available regardless of "any other means of adjustment." See *Producers Grain Corp.*, 169 NLRB No. 68. Hence, apart from other considerations, absent any properly grievable issue, the Union's rejection of the Company's "grievance" did not constitute a violation of the Act. The purported analogy to the Union's right to grieve while pressing an unfair labor practice charge is inept in view of the Company's right of positive action, including management of the plant and direction of the working force, *vis a vis* the Union's mere negative right of protesting, through a grievance procedure, unreasonable exercise of managerial authority. See, e.g., *American Chain & Cable Co.*, 17 LRRM 1532, 1533 (War Labor Board, 1945).

Very truly yours,

ARNOLD ORDMAN
General Counsel

By IRVING M. HERMAN
Irving M. Herman
Director, Office of Appeals

cc: Director, 1st Region

CERTIFIED MAIL

[Distribution List omitted]

Excerpts From Decision of NLRB in United Aircraft Corporation and Lodges 1746 and 700, IAMAW, AFL-CIO, 180 NLRB No. 49, p. 2, n. 2, Case No. 1-CA-6475, et al.

---

[2] The Respondent argues, in effect, that the Board's powers may not be invoked or should not be exercised in this case because of the existence of a provision in the collective-bargaining agreement authorizing arbitration in the event of employee grievances, including discharges. In this connection, the existence of a grievance-arbitration procedure in a collective agreement does not oust the Board of its power, nor relieve it of its public duty, to act to inhibit unfair labor practices cognizable under the Act. Section 10(a) of the Act explicitly provides that the power of the Board with respect to unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ." In cases of this type, the Board has been unwilling to defer to available arbitration, where the parties themselves have chosen not to resort to that forum; we find no justification for abandoning our statutory authority here. See, e.g., *Morrison-Knudsen Company, Inc.*, 173 NLRB No. 12; *The Coachman's Inn*, 147 NLRB 278, 306.

Excerpts From Decision of Trial Examiner in NLRB No. 1-CA-6475, et al., pp. 21-22

C. *Respondent's Efforts to Channel Discipline Cases Into Grievance-Arbitration Procedure*

At all times here material the collective-bargaining agreement between the parties has provided as follows (Article IV, 1968 contract):

> There shall be no solicitation of employees for union membership or dues conducted upon the premises of the company during working hours by the union, its representatives or by employees.

The Respondent's rule book, "You and Your Company," provides in Rule 5 that among the "strictly forbidden" practices are:

> Gambling, taking orders, selling tickets, or soliciting money or any other type of solicitation.

Over the years the Respondent has posted notices admonishing against solicitation activities. Thus, by notice dated March 26, 1968, employees were advised:

> With the exception of Company-approved charitable solicitations of a plant-wide nature, there should be no solicitation of money or any other type of solicitation during working hours on Company premises without the specific prior approval for each such solicitation . . . .

Other plant bulletins deal solely with solicitation for union membership and emphasize that employees are expected "to adhere strictly" to the contractual provision and Company rule set forth above.

Following the suspension of Wing and Pegorer the Respondent wrote to Lodge 700 of the Union on September 19, 1968, noting that no grievance had been filed regarding their suspension and pointing out that the then current contract obligated the parties to make "an earnest effort" to resolve differences through the grievance procedure, including arbitration if necessary. The Respondent requested the Union to state "whether in fact a difference" existed concerning the suspensions and asked if the Union would comply with the Respondent's request "to resolve such differences by bargaining through the procedures established by the contract—including, if necessary, arbitration." The Union replied under date of October 1, refusing the Respondent's request, stating that it would shortly file unfair labor practices covering Wing's case, and contending that his suspension was "no mere contract

dispute'' but rather was ''part and parcel of the Company's continuing program of unfair labor practices, designed to decimate, degrade, disparage and disable the Union, to prevent it from functioning effectively as statutory bargaining agent.[7] Unfair labor practice charges were filed as to Wing and Ardenski, and the Regional Director issued a complaint thereon on December 30.

In the meantime, the contract expired on November 30, 1968, and negotiations for a new agreement had been entered into by the parties. During these negotiations the Respondent, on November 26, proposed an amendment to the contract grievance provision which would allow the Respondent the right at the fourth step to file a grievance concerning the discharge or suspension of an employee ''in the event that either an employee or the union filed a charge'' with the Board ''alleging that his discharge or suspension was a violation'' of the Act, which ''grievance'' could be processed through arbitration, if necessary. The Union rejected this proposal. At the November 29 negotiations session the Respondent proposed that such a grievance could be filed at the third step, explaining that it was not dependent upon the employee or the Union having first filed a charge with the Board, ''simply to provide a vehicle for the company to determine whether in fact there is any dispute concerning'' the discharge or suspension ''and if so, to resolve it by bargaining . . . or in arbitration.'' The Respondent made clear that its proposal did not preclude the Union or the employee from filing charges with the Board.

In final negotiations on November 30 the Union accepted the Respondent's proposal, but then read a prepared statement stating that by entering into the agreement it ''does not intend to waive, and has not waived, any statutory

---

[7] Also by letter dated September 19 to Lodge 1746, the Respondent made a similar inquiry regarding Ardenski's discharge and under date of October 1 received a substantially similar reply.

rights'' and contending that certain provisions including the one allowing the Company ''to process a grievance under the 'just cause' provision,'' ''violate our statutory rights'' and were accepted ''under coercion'' and the Union intended ''to challenge their legality.''

On January 21, 1969, a week after having discharged Wiseman, the Respondent filed its ''grievance concerning the discharge'' of Wiseman, placing the grievance at the third step agenda for discussion at the Committee of Management meeting scheduled for January 23, explaining that it was Respondent's position that ''Mr. Wiseman was discharged for just cause.'' At the third step meeting on January 23, the Union refused to discuss this ''grievance''; its representative read a prepared statement that, upon advice of counsel, ''the Union considers this discharge a violation of statutory rights and an unfair labor practice'' and, accordingly, ''refuse[d] to subject this discharge to the grievance procedure and will file an unfair labor practice charge with the Board.''

In the fourth step meeting held on January 31 the Respondent again stated its position was that Wiseman ''was discharged for just cause because he solicited for Union membership during working hours on Company premises.'' The Union's representative reiterated that the Union considered the discharge a violation of statutory rights and had filed unfair labor practice charges. Alluding to an earlier indication from a union representative that the Union could provide witnesses who would establish ''that Wiseman had been threatened by other employees who said they were out to 'get' him,'' Respondent's representative urged that the Union was under obligation to inform the Company if they had any information that Wiseman ''was not guilty,'' and stated that the Respondent would thereupon check into the situation and take corrective action if that were indicated.

Under date of February 4, 1969, the Respondent wrote the Union on the Wiseman case, stating it was appealing

the case to arbitration and proposing that the matter be heard by Arbitrator I. Robert Feinberg, one of the arbitrators agreed upon in the contract. The Union replied under date of February 11, stating that in its view, "the provision of the contract for submission to arbitration of specified disputes . . . has no relevance or application to this case." Accordingly, the Union declined to join in designating Mr. Feinberg to hear the case.[8]

D. *Contentions and Discussion*

The General Counsel cogently argues that the Respondent disparately, "excessively," and "coercively" enforced its no-solicitation rule and contract provision as to each of the three alleged discriminatees. The Union echoes this argument. In addition, the General Counsel urges that the statutory rights of the employees must here be vindicated by appropriate remedial action. On this facet, the Union underscores and elaborates on the legal points made by General Counsel, contending not only that this is not a proper case in which the Board should refer the parties to use of their grievance-arbitration procedures, but that to do so would be destructive of well-recognized statutory rights. Moreover, argues counsel for the Union, the Respondent, in urging that the alleged discrimination against

---

[8] The Union also alluded to a prior charge (1-CB-1429) filed by the Respondent stemming, apparently, from the Wing and Ardenski cases, which the Regional Director dismissed. The Union stated that it considered "your invocation of the grievance and arbitration provisions of the contract in this case as attempt to circumvent the decision of the Regional Director in Case No. 1-CB-1429, and defeat the statutory right and immunity there recognized and vindicated. We cannot and will not acquiesce." The Respondent did not appeal to the General Counsel. On February 20, 1969, the Respondent filed another charge (1-CB-1474) alleging that the Union's action in refusing to handle the Wiseman case through the grievance-arbitration procedure was a violation of the Union's obligation to bargain. The Regional Director refused to issue a complaint and on July 15, 1969, the General Counsel affirmed such disposition of that case.

the individuals here involved should have been submitted to the grievance procedure provided by the collective-bargaining agreement, is attempting to assert a right to have its statutory breaches settled outside the Board's exclusive jurisdiction and is seeking to invoke against the Union a waiver of access to the Board's processes which plainly has, at best, been agreed to under protest. Briefly stated, the Respondent contends that the "common law" of the shop, as interpreted and applied in arbitrations over the years, clearly requires a strict construction of the "no-solicitation" rule and that the individuals alleged to have been discriminated against in fact did violate the rule or, at the least, were believed by the Respondent, in good faith, to have done so.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISON OF TRIAL EXAMINERS
WASHINGTON, D. C.

UNITED AIRCRAFT CORPORATION
(PRATT & WHITNEY DIVISION)

and

CANEL LODGE 700, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Case No. 1-CA-6967

Order

I. On April 14, 1970, the Charging Party moved to correct the record by noting the appearances of Plato E. Papps, Esq., and Mozart G. Ratner, Esq., as counsel for it. No objection was made to such motion. It is hereby granted.

II. On April 15, 1970, the General Counsel moved to amend paragraph 1 of the complaint by adding the following sentence:

> The amended charge in this proceeding was filed by the Union on April 2, 1970, and a copy thereof was served upon Respondent on said late. [sic]

The General Counsel further moved that a copy of the amended charge and of the affidavit of service thereof be received in evidence as General Counsel's Exhibits 1(g) and 1(h), respectively.

There was no objection to the foregoing motions and they are hereby granted.

III. At the hearing Respondent moved to stay further action herein pending the outcome of a proceeding to compel arbitration instituted by Respondent in the United

States District Court for the District of Connecticut. Ruling was reserved on this motion and testimony was taken on a provisional basis.

The only issue litigated was whether Respondent had discriminated against Tobin, a Union shop steward, by suspending him for one day because of an incident involving the delivery to him of a Union membership card and dues check-off card during worktime. The Union's contract with Respondent prohibited the collection of dues checkoff cards during worktime. (See Appendix A, Section 1, on p. 64, of "Exhibit A" attached to Respondent's Exhibit 1.) Article IV of that contract also prohibits discrimination against employees for engaging in Union activities. Article VII prescribes an elaborate grievance procedure culminating in arbitration. However, no grievance was filed by the shop steward here involved. Instead, the Union filed a charge with the Board which resulted in the instant proceeding. Respondent then brought suit to compel arbitration.

Thus, this dispute over one-day's suspension of an employee is now engaging the attention of a Board Trial Examiner and a federal court, and, if it take [sic] the same course as other litigation between the same parties, this dispute will ultimately require consideration by Board members and a federal appellate court,[1] and will consume untold man-hours of their time as well as of the time of Board staff members and of the staff of the General Counsel, in addition to the time already spent thereon. If one adds the value of the services of Respondent's counsel and Union's counsel, it would seem that a conservative estimate of the expense of litigating this matter, as well as the arbitration case, will run into several thousands of dollars.

---

[1] For a partial resume of previous Board litigation involving Respondent and various IAM Locals, see pp. 2-4 of the General Counsel's brief in the instant case. It may be noted also, that in its brief herein, the Union asserts that the pending suit to compel arbitration will be carried either by it or Respondent to the appeals court.

It is true that more is involved here than one day's back-pay for one man. If Respondent is ultimately found to have discriminated against Tobin, the conventional remedy would include a requirement that it post a notice promising not to discriminate against employees for Union activity. However, the Board has recently issued two decisions finding that Respondent discharged or suspended a number of employees, including union stewards, for Union activity and requiring it to post at various of its plants, including the one here involved, notices abjuring any future resort to such conduct.[2] Petitions for review of both those cases are pending before the Court of Appeals for the Second Circuit. If the Board prevails in either of those cases, an appropriate notice will have to be posted by Respondent, which will presumably cure the coercive effect of any past discrimination, including that here involved.

It is clear, therefore, that apart from compensating Tobin for loss of one day's pay, little, if anything, will be gained by the inordinate expenditure of money and time required to process this matter further. In view of this, it may not be too much to hope that the parties, with the help of their exceptionally able counsel, will devise some formula for disposing of this matter without further litigation.

At any rate, in view of the concurrent resort by the Union and Respondent to different forums, it would seem appropriate to withhold any further action herein pending the outcome of the suit to compel arbitration. Accordingly, Respondent's motion to stay is hereby granted.[3]

/s/ SIDNEY SHERMAN
Sidney Sherman
Trial Examiner

Dated: May 15, 1970
Washington, D. C.

---

[2] *United Aircraft Corporation,* 180 NLRB No. 49; 179 NLRB No. 160.

JUNE 3, 1970
6:54 PM

LLD217 WA241
(TX) GRC GOVT PDB WASHINGTON DC 3 415P EDT

MOZART G. RATNER

818 18TH ST NORTHWEST WASHDC

RE UNITED AIRCRAFT CORP (PRATT AND WHITNEY

DIVSN) 1-CA 6967.

GENERAL COUNSELS AND CHARGING PARTYS REQUEST FOR SPECIAL PERMISSION TO APPEAL TRIAL EXAMINERS RULING GRANTING RESPONDENTS REQUEST TO STAY FURTHER PROCEEDINGS PENDING OUTCOME OF RESPONDENTS PETITION IN DISTRICT OF CONNECTICUT COURT OF COMPEL ARBITRATION IS HEREBY GRANTED, THE APPEAL IS GRANTED AND THE TRIAL EXAMINER IS REVERSED. THE TRIAL EXAMINER IS DIRECTED TO PROCEED FORTHWITH WITH HIS DECISION ON THE MERITS OF THE PROCEEDING. BY DIRECTION OF THE BOARD
GEORGE A LEET ASSOC EXEC SECY
1-CA 6967
(511).

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case No. 1-CA-6967

UNITED AIRCRAFT CORPORATION
(PRATT & WHITNEY DIVISION)

and

CANEL LODGE 700, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Ruling on Motion To Defer Action

At the hearing in the above case Respondent moved to stay further action on the complaint pending the outcome of a proceeding to compel arbitration then pending before a federal district court. On May 15, 1970, I issued

an order granting that motion. On June 3, that order was reversed by the Board, which directed that this Examiner "proceed forthwith with his decision on the merits."

On June 22, Respondent filed with me a new motion for a stay pending arbitration, citing the fact that the district court had on June 17, ordered arbitration.[1] Respondent cites *Dubo Manufacturing Co.*, 142 NLRB 431, where the Board stayed action on the 8(a)(3) allegations of the complaint, because a federal district court had ordered arbitration in a suit filed by the union, which was the charging party before the Board. Here, the suit was filed by the respondent before the Board. However, the Board's decision in *Dubo* did not turn on any policy against permitting a party to pursue concurrent remedies simultaneously, but rather on the legislative and administrative policy of encouraging resort to an available grievance procedure. The Board there stated:

> The policy considerations are clearly applicable here where not only the parties have available a procedure to settle the dispute, but a United States District Court has ordered them to utilize it. It would certainly frustrate the intent expressed by Congress if the Board were now to permit the use of the Board's processes to enable the parties to avoid their contractual obligations as interpreted by the court.

It is not clear why the same considerations would not apply here. However, in issuing its order of June 3, the Board presumably took into account the possibility that the court would order arbitration. Yet, the Board did not see fit to make any provision for such contingency, ordering that the case be processed forthwith on the merits.

---

[1] A copy of the court's ruling is appended to Respondent's motion. Its prayer for permission to "lodge" such ruling with the Examiner is hereby granted. The Union filed opposition to Respondent's motion to defer.

Accordingly, I construe the Board's order as dispositive, at least by implication, of the issue now raised and as binding me to continue with such processing, notwithstanding the action of the court. The present motion is therefore denied. However, as the matter is not entirely free from doubt, I will suspend any further action on the merits until Respondent has exhausted its right to appeal to the Board from this ruling, and, in the event of such appeal, until the Board has acted thereon.

/s/ SIDNEY SHERMAN
Sidney Sherman
Trial Examiner

Dated: June 24, 1970
Washington, D. C.

TXA058 A WA130
(TX) EM GOVT PDB WUX/ WASHINGTON DC 1 1019A EDT
MOZART G RATNER

818 EIGHTEENTH ST NORTHWEST WASHDC

RE: UNITED AIRCRAFT CORPORATION (PRATT & WHITNEY DIVISION), 1-CA-6967.

CHARGING PARTYS REQUEST FOR SPECIAL PERMISSION TO APPEAL TRIAL EXAMINER'S RULING DEFERRING DECISION UNTIL APPEAL IS TAKEN AND RULED UPON IS HEREBY GRANTED, THE APPEAL IS GRANTED AND THE TRIAL EXAMINER IS REVERSED. HE IS DIRECTED TO DECIDE AND ISSUE HIS DECISION WITHOUT FURTHER DELAY. BY DIRECTION OF THE BOARD

GEORGE A LEET ASSOC EXEC SECY NLRB.

1-CA-6967. (104)

TXD-385-70
Middletown, Conn.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case No. 1-CA-6967

UNITED AIRCRAFT CORPORATION
(PRATT & WHITNEY DIVISION)

and

CANEL LODGE 700, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

A. Gene Niro, Esq.,
for the General Counsel.

Joseph C. Wells, Esq., Washington, D. C.,
for Respondent.

Stephen D. Gordon, Esq.,
Mozart G. Ratner, Esq., and
Plato E. Papps, Esq., Washington, D. C.,
for the Charging Party.

Trial Examiner's Decision

SIDNEY SHERMAN, Trial Examiner: The original charge herein was served upon Respondent on January 8, 1970, the complaint issued on February 12, and the case was heard on April 2. The only issue litigated was the legality of the suspension of a Union steward under Section 8(a)(3) of the Act. After the hearing, briefs were filed by all parties.

Upon the entire record[1] including observation of demeanor, the following findings and recommendations are adopted.

I. Respondent

United Aircraft Corporation, herein called Respondent, is a Delaware corporation and is engaged at its plants in Connecticut in the manufacture of aircraft engines and related products. It annually receives, and ships, in interstate commerce products exceeding $1,000,000 in value. Respondent is engaged in commerce under the Act.

II. The Union

Canel Lodge 700, International Association of Machinists and Aerospace Workers, AFL-CIO, hereinafter called the Union, is a labor organization under the Act.

III. The Unfair Labor Practices

The only issue herein is whether Respondent discriminated against Tobin, a Union shop steward, with respect to certain disciplinary action taken against him.

A. *Sequence of Events*

At the time of the hearing, in April 1970, Tobin had been a Union shop steward at the instant plant in Middletown, Connecticut, for about 1 year, had been the Union's recording-secretary since August 1969, and had in 1969 successfully solicited 34 employees to join the Union. He had worked for Respondent over 4 years, had received a number of promotions, and in August 1969, received a commendation for saving two fellow-employees from injury. He had been the object of disciplinary action only once—in 1966, when he was reprimanded for absenteeism.

The current Union contract provides for check-off of Union dues and initiation fees, but contains a stipulation that no check-off authorization cards will be distributed or

---

[1] For corrections of the transcript, see the order of June 9, 1970.

collected during working hours on company premises.[2] There is also a plant rule and a contract provision limiting solicitation by employees.

On December 15, Graves executed a membership application card and a check-off authorization card and while at work solicited the advice of another employee, Tibbits, as to how these cards could be transmitted to the Union, and, when Tibbits volunteered to deliver them to a Union steward, Graves gave him the cards. Tibbits then approached Tobin and, without explaining the nature of the cards, handed them to him. Upon perceiving what the cards were, Tobin observed that "this" could not be done on company time and dropped them on a table. However, upon seeing a supervisor approach, Tobin immediately covered the cards with a sheet of paper, and, when asked by the supervisor what was going on, gave a non-committal answer, but, as the supervisor drew nearer, and it appeared that he would discover the truth, in any event, Tobin decided to make a clean breast of the matter. Uncovering the cards, he explained that Tibbits had attempted to pass them to him. The entire incident lasted less than a minute.[3]

The next day, Respondent launched an investigation and on December 29, Tobin was notified of his suspension from

---

[2] This stipulation is contained in Appendix A of the contract and reads as follows:

> Section 1. The union shall assume all responsibility for the distribution and collection of payroll deduction assignment cards for union dues and the initiation fee, and agrees that such distribution and collection will not be carried on during working hours on company premises.

[3] The foregoing findings are based on the testimony of Tobin, which was in the main consistent with that of Tibbits, except that the latter insisted that it was the supervisor, and not Tobin, who uncovered the cards. However, as Respondent failed to call the supervisor, and no explanation was offered for such failure, it is inferred that he would not support Tibbits in that regard. Accordingly, Tobin is credited. In any event, even if Tibbits be credited, that circumstance, as will appear from the ensuing discussion, would not affect the ultimate result herein.

work for one day without pay, on account of his role in the matter, such suspension to be effective the next day. Tibbits received only a written reprimand and Graves an oral one.

Although the Union contract contains an elaborate grievance procedure culminating in arbitration, no grievance was filed thereunder by the Union or Tobin. Instead, the Union filed the instant charge, whereupon Respondent filed suit in federal district court to compel arbitration of "a dispute concerning the disciplinary suspension" of Tobin. That suit is still pending.[4]

B. *Discussion*

The General Counsel and the Union contend as follows:

(a) Tobin did not in fact violate any company rule or contract provision, since he was not engaged in collecting the cards when the supervisor appeared, but was in fact in the process of rejecting cards which had been thrust upon him.

(b) Tibbits, who was not a Union member, received a lesser penalty, notwithstanding that his misconduct was clearer than Tobin's.

(c) Respondent has a history of discharging Union stewards for discriminatory reasons under the guise of enforcing a plant rule or contract provision.

(d) Respondent's motive in suspending Tobin was not concern over misuse of working time but was to discourage employees from becoming shop stewards, and to demean such stewards, and the Union, itself.

These matters will be considered *seriatim.*

---

[4] On May 15, 1970, I issued an order granting Respondent's motion to stay the instant proceeding pending the outcome of such suit. This order was reversed, on appeal, by the Board, with a direction "to proceed forthwith with [a] decision on the merits." See, also, the ruling of June 24.

(a) *Did Tobin violate any plant rule or contract provision?*

Among the published plant rules is one forbidding the following conduct:

> Gambling, taking orders, selling tickets, or soliciting money or any other type of solicitation.[5]

The Union contract also bars any solicitation of employees for Union membership or dues on Company premises during working time. In addition, as noted above, the Union contract interdicts any collection of dues check-off cards during worktime.

At the hearing, Respondent's assistant personnel manager, Hall, testified that it was he who determined in the first instance the nature of the disciplinary action against Tobin, as well as Tibbits and Graves, and that he concluded from the investigative reports he received concerning the incident that Tobin had violated the afore-quoted plant rule and contract clause against solicitation, as well as the contractual prohibition of the collection of check-off authorizations. Hall explained that he regarded Tobin's receipt of Graves' check-off authorization card under the circumstances described above as constituting "collection" of the card within the intendment of the contract, and that he equated collecting such cards with the sort of solicitation that was proscribed by rule and contract. In its brief, however, Respondent makes no reference to the "solicitation" issue, relying only on the alleged breach of the contractual ban on collection of check-off cards. In any event, it is clear that the basic difference between the parties is whether there was any "collection" here by Tobin. Respondent points to various circumstances which it contends indicate that, although Graves' cards were thrust upon Tobin by Tibbits, and Tobin's initial reaction was a negative one, he finally decided to retain the cards

---

[5] While such rule would on its face seem unduly broad, insofar as it applies to Union solicitation, the matter was not litigated, presumably because of the narrower, more specific language of the contract, next discussed in the text.

for delivery to the Union's headquarters. Thus, Respondent points to the fact that, instead of returning the cards to Tibbits, Tobin dropped them on a table before him and, upon perceiving the approach of a supervisor, attempted by various means to conceal from him the existence of the cards, making a complete disclosure only when he became convinced that the supervisor would discover the truth, in any event. On the other hand, the General Counsel and Union point out that, had Tobin intended to retain the cards, he could have put them in his pocket instead of dropping them on the table, and that his initial efforts at concealment of the matter from the supervisor were prompted, not by a desire to retain the cards, but rather by a fear that the supervisor would place a wrong construction on the incident.

Strangely enough, no party asked Tobin directly at the hearing whether he in fact intended to retain the cards. Since he was the General Counsel's witness, and it would clearly have been to his interest to deny any such intent, if, in fact, he had none, the failure of the General Counsel to put the question warrants an adverse reference. Accordingly, it is found that, although he at first indicated to Tibbits his reluctance to accept the cards, the approach of the supervisor forced Tobin to choose between retaining the cards or turning them over to the supervisor with an explanation of what had happened, and he chose the former alternative.[6] However, it is clear that this choice was only momentary, since, upon perceiving that the supervisor was "zeroing in" on the cards and that Tobin's efforts at concealment would therefor be unavailing, he promptly abandoned his intention to keep the cards and decided to make a full disclosure. Whether such an "on-again-off-

[6] It may well be that, as the General Counsel contends, Tobin feared that the supervisor would put a wrong construction on the incident and refuse to credit his explanation. However, that apprehension would make it all the more likely that Tobin would decide to keep the cards, since he would obviously have nothing to lose by doing so, if his only alternative was to offer an explanation which would not be accepted.

again'' intention to retain the cards, coupled with Tobin's overt acts, added up to ''collection'' under the contract is a difficult question. However, there is no need to resolve this matter, since it suffices for present purposes to find, as I do, that Respondent was, in any case, justified in believing that Tobin intended to keep the cards and that he would have kept them if the supervisor had not come upon the scene, and that he was thereby engaging in conduct forbidden by the contract. It is further found that such belief would be a valid defense to the instant charge, if that was in fact the motivating reason for the suspension of Tobin.[7] We now proceed to consider the latter issue.

---

[7] While under *N.L.R.B.* v. *Burnup and Sims, Inc.*, 379 U.S. 21, an employer's honest belief is no defense to a charge of discrimination, regardless of motivation, that rule is limited to the situation where the employee has in fact engaged in protected concerted activities but discipline is imposed because of an erroneous belief that such activities are unprotected. Here, the situation is that Tobin was either engaged in collecting a dues check-off card during worktime, which was an unprotected concerted activity, or was refusing to collect such a card, which would be the antithesis of concerted action. Accordingly, the question of motivation is here one of fact, to be determined upon all the evidence, and is not controlled by the rule of law laid down in *Burnup and Sims, Inc.*

(While it is not clear that the Board has always strictly observed the foregoing limitation on *Burnup and Sims* (See the *dictum* in *Marion Manufacturing Company*, 161 NLRB 55, 56 (fn. 1)), such limitation is clearly spelled out in the Court's opinion, where the rule is stated as follows:

> In sum, section 8(a)(1) is violated if it is shown that *the discharged employee was at the time engaged in a protected activity*, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct. (Emphasis added.)

This is in accord with the rationale of the Court that an employee should not be required to engage in concerted activities at the risk that he will be erroneously charged with some misconduct in connection therewith. That rationale would not be applicable to the case of an employee who, like Tobin, is disciplined for alleged misconduct in connection with concerted activities, if, as the General Counsel contends, he was not in fact at the time of such alleged misconduct engaging in concerted activities of any sort but was carefully eschewing such activities.)

(b) *Disparity of treatment*

As already related, although Tobin was suspended for one day, Tibbits, who was not a Union member, received the lesser panalty [sic] of a written reprimand. (Graves, an applicant for Union membership, received a still lighter penalty—an oral reprimand.) Hall acknowledged that he regarded the contractual ban on collection of check-off cards as applying not only to Union officials but to all employees,[8] and that Tibbits had therefore violated the contract. He insisted, however, at one point, that Tibbits' offense was not so serious as Tobin's, because Tibbits was merely doing another employee a favor in handing the cards to Tobin. Even after it was pointed out that Tibbits had played a more active role than Tobin, in that he had volunteered to take the cards from Graves and had thrust them upon Tobin, Hall insisted that Tibbits was "more or less an innocent victim of a request." This attempt to assimilate Tibbits' role to that of an innocent bystander reflects on Hall's candor as does his subsequent vacillation between that position and his avowal that he regarded Tobin's offense as the more serious because the contract provision represented a commitment by the Union and Tobin "was a part of that union." Moreover, such avowal is perhaps the most damaging evidence in the record against Respondent. The evident meaning thereof, considered in conjunction with Hall's prior testimony, is that, while he deemed all employees, and not only the official Union representatives, to be bound by the contract provision, he took a dimmer view of a breach by one, like

---

[8] This construction of the contract seems unavoidable, since to hold only Union Officials were forbidden to collect check-off cards would defeat the purpose of the provision of preventing disruption of work. Such disruption would be likely to be just as great if the collecting were done by employees other than such officials as where it was done by them.

As to the ban in solicitation, it is clear from the text thereof that it applied to all employees.

Tobin, because he was a member of the Union's hierarchy and the provision represented an undertaking by the Union.[9] However, this is tantamount to saying that, where two employees are guilty of a breach of a provision in a union contract, the employer may base the severity of their punishment on the extent of their involvement with the union or on their position in the union's hierarchy. Respondent fails to suggest, and one is at a loss to perceive, how any such proposition may be squared with the provisions of Section 8(a)(3) of the Act.

(c) *The "pattern" theory*

The General Counsel and the Union contend, further, that Respondent's treatment of Tobin was part and parcel of its over-all strategy, as found by the Board in prior cases, of undermining the Union by denigrating its stewards. Citation is made to two recent Board decisions involving Respondent,[10] in which it was found that, in addition to a number of other unfair labor practices, disciplinary action taken by Respondent against a total of 10 Union stewards, which action ranged from a 3-day suspension to discharge, was unlawful because motivated by Union animus. In those cases, the Board rejected as pretextual Respondent's contention that the disciplinary action was based on violations of its plant rule and contractual provision against solicitation. It is now urged that, in view of the similarity of the circumstances of the instant case and such other cases, it should be found here, as there,

---

[9] Hall did not contend that he held Tobin to stricter accountability because he was presumed to be more familiar with the provisions of the contract. Such a contention was precluded, in any event, by the fact that Tibbits' written statement to Respondent's investigators contained the admission that he knew that "it was wrong" for him to deliver the cards to Tobin.

[10] *United Aircraft Corp.*, 179 NLRB No. 160, and 180 NLRB No. 49.

that Respondent's true motive was to discourage Union activity.

There appears to be force to this contention. While it has been found that Respondent was justified in believing that Tobin did, in fact, engage in conduct which contravened the contract, this was also true of some of the stewards involved in the prior cases.[11] Nevertheless, the Board found upon all the evidence that it was not such misconduct but Respondent's hostility to the Union that motivated the disciplinary action taken.

(d) *Conclusion as to motivation*

Respondent points to the minimal nature of the disciplinary action against Tobin, and at first blush it seems improbable that Respondent would hope to downgrade the Union and its stewards in the eyes of the employees by such a mild measure as a one-day suspension. However, in the case of one of the stewards involved in the prior case, the discipline consisted only in a 3-day suspension. Respondent cites, also, the fact that after Tobin became shop steward he received both a promotion and a commendation. I have given due weight to this circumstance, as well as all the other matters relied upon by Respondent, but do not believe that they suffice to counterbalance the weight of the evidence of discriminatory motivation, consisting, as it does, of the pattern of discrimination against Union stewards established by the Board's findings in the earlier cases, the relative inconsequentiality of Tobin's

---

[11] See the cases of stewards D'Andrea and Menard, discussed at page 8 of the Board's Decision and pp. 6 to 11 and 16 to 19 of the Trial Examiner's Decision in 179 NLRB No. 160, both of whom were found to have engaged in some improper solicitation. Moreover, as to stewards Nelson and Tardiff, as well as Menard, the Board there stated that whether or not they "actually engaged in union solicitation or activity during working time, this was merely a pretext to conceal Respondent's discriminatory motive in disciplining them."

conduct in terms of effect on production,[12] the disparity in treatment of Tobin as compared to Tibbits, the difficulty encountered by Hall in attempting to explain such disparity, and his final admission, in effect, that he meted out a more severe penalty to Tobin than to Tibbits because of Tobin's Union status. Accordingly, it appears that the evidence preponderates in favor of a finding that, in suspending Tobin, Respondent violated Section 8(a)(3) and (1) of the Act.[13]

IV. The Remedy

Having found that Respondent engaged in certain unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act, I shall recommend that it be directed to cease and desist therefrom and take appropriate, affirmative action.

It having been found that Respondent discriminatorily suspended Tobin on December 30, 1969, I shall recommend that it be ordered to make him whole for any loss of pay resulting therefrom, less his net earnings during that period. Such backpay shall include interest at 6 percent as provided in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

---

[12] As related above, the entire incident on December 15, lasted less than a minute.

[13] In arriving at this conclusion, I have given no weight to the General Counsel's contention that, as shown by evidence adduced in the two prior cases, Respondent did not enforce any of its various prohibitions against misuse of working time, except where Union activities were involved, and that the suspension of Tobin therefore represented a unlawful, discriminatory application of such prohibitions. A similar contention was rejected by the Board in such prior cases, and is rejected here for the reasons there stated.

Conclusions of Law

1. Respondent is an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By suspending Tobin on December 30, 1969, for discriminatory reasons, Respondent has violated Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Recommended Order

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, it is recommended that United Aircraft Corporation, its officers, agents, successors, and assigns, shall be required to:

1. Cease and desist from:

(a) Suspending employees or otherwise discriminating against them in order to discourage membership in Canel Lodge 700, International Association of Machinists and Aerospace Workers, AFL-CIO, or any other labor organization.

(b) In any other manner interfering with, restraining or coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act, except to the extent permitted by the proviso in Section 8(a)(3) of the Act.

2. Take the following affirmative action, which is deemed necessary to effectuate the policies of the Act:

(a) Make whole Theodore B. Tobin for any loss of pay he may have suffered by reason of the discrimination against him, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Post at its Middletown, Connecticut, plant, copies of the attached notice marked "Appendix."[14] Copies of said notice, on forms provided by the Regional Director for Region 1, shall be signed by Respondent's authorized representative, and posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 1, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[15]

Dated at Washington, D. C., July 13, 1970.

/s/ SIDNEY SHERMAN
Sidney Sherman
Trial Examiner

---

[14] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided by Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes. In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[15] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order what steps Respondent had taken to comply herewith."

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
MAR 1 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1416

CANEL LODGE NO. 700, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner,

v.

UNITED AIRCRAFT CORPORATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PLATO E. PAPPS
Machinists Building
Washington, D. C. 20036

MOZART G. RATNER
818 18th Street, N. W.
Washington, D. C. 20006
Counsel for Petitioner

March 1, 1971

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
A. The Suspension of Tobin; the Union's Charge; the Company's "Grievance" and Demand for Arbitration	3
B. The Relevant Provisions of the Agreement	5
C. The Proceedings Below	6
1. The Company Institutes This Action	6
2. The Company Utilizes This Action To Delay the NLRB Proceeding Against It	7
3. The District Court Orders Arbitration	9
4. The Court of Appeals Affirms the District Court's Order	10
REASONS FOR GRANTING THE WRIT	12
The Decision Below Is Inconsistent With the Decisions of This Court, Undermines the National Labor Policy, and Multiplies Litigation	12
INTRODUCTION	12
I. SECTION 203(d) DOES NOT REQUIRE ARBITRATION OF THE COMPANY'S "GRIEVANCE"	13
II. SECTION 10(a) FORBIDS COMPELLING THE UNION TO ARBITRATE THE COMPANY'S "GRIEVANCE"	17

Page

CONCLUSION 20

APPENDIX B—Statutes Involved B1

APPENDIX C—Decision and Order of NLRB in Case No. 1-CA-6967 ..... C1

AUTHORITIES CITED

CASES:

Atkinson v. Sinclair Rfg. Co., 370 U.S. 238 14
Amazon Cotton Mills Co. v. Textile Workers Union, 167 F. 2d 183 (4 Cir.) 16
Automobile Workers v. Russell, 356 U.S. 634 16
Boyd v. Grand Trunk Western R. Co., 338 U.S. 263 18
Boys Markets v. Retail Clerks, 398 U.S. 235 .....10, 16
Carey v. Westinghouse Corp., 375 U.S. 261 20
The Fair v. Kohler Die & Specialty Co., 228 U.S. 22 .. 18
Graham v. Brotherhood of Firemen, 338 U.S. 232 19
Hutchings v. United States Industries, Inc., 428 F. 2d 303 (5 Cir.) 16
Kentile, Inc. v. Local 457, Rubber Workers, 228 F. Supp. 541 (E.D. N.Y.) 18
Labor Board v. Burnup & Sims, 379 U.S. 21 9
Nash v. Florida Industrial Comm'n, 389 U.S. 235 17
NLRB v. Acme Industrial Co., 385 U.S. 432 18
NLRB v. Marine Workers, 391 U.S. 418 17
Public Service Commission of Utah v. Wycoff Co., 344 U.S. 237 19
Silvercup Bakers, Inc. v. Fink Baking Corp., 273 F. Supp. 159 (S.D. N.Y.) 17, 18
Smith v. Evening News Assn., 371 U.S. 195 12
Steelworkers v. Warrior & Gulf N. Co., 363 U.S. 574 15
Twin Excavating Co. v. Local Union No. 731, 337 F. 2d 437 (7 Cir.) 17
United Aircraft Corporation v. Hartford Aircraft Lodge No. 743, International Association of Machinists and Aerospace Workers, AFL-CIO, No. 14,206 (D. Conn.) 14

Page

U. S. Bulk Carriers v. Arguelles, 39 U.S. L.W. 4101 13, 18, 19
United States Steel Corp. v. Seafarers Int'l Union, 237 F. Supp. 529 (E.D. Pa.) 17
United Steelworkers v. American International Aluminum Corp., 334 F. 2d 147 (5 Cir.) 15, 16
Vulcan Materials Co. v. United Steelworkers, 434 F. 2d 446 (5 Cir.) 17
Wilko v. Swan, 346 U.S. 427 18

MISCELLANEOUS:

Dunau, Three Problems In Labor Arbitration, 55 Va. L. Rev. 427 (1969) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

CANEL LODGE NO. 700, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner,

v.

UNITED AIRCRAFT CORPORATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Canel Lodge No. 700, International Association of Machinists and Aerospace Workers, AFL-CIO, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this proceeding on December 11, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet officially reported and is unofficially reported in 76 LRRM 2111. It is reprinted in Appendix A, pp. 2a-7a.[1] The opinion of the District Court of June 17, 1970, and its order of June 24, 1970, are not yet officially reported but are reprinted at 74 LRRM 2518. They are printed in Appendix A at pp. 7a-22a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on December 11, 1970. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether Section 203(d) of the Labor Management Relations Act of 1947 requires, and Section 10(a) of the Act permits, a collective bargaining agreement to be construed or enforced to empower the alleged offender to file a "grievance" based upon its own allegedly illegal conduct, thereby compelling the party aggrieved to submit to duplicative contract arbitration as the price of filing charges with the NLRB?

STATUTE INVOLVED

This case involves §§ 7, 8(a)(1), 8(a)(3), 10(a), 203(d), and 301(a) of the National Labor Relations Act, as amended, 49 Stat. 449, and the Labor-Manage-

[1] An Appendix to this Petition, containing the opinions below, and rulings of the National Labor Relations Board and its officials in related proceedings has been separately printed. It is referred to herein as "App. A". References to the Record Appendix printed for use in the court below are designated "R". Relevant statutory provisions are printed in Appendix B, *infra*.

ment Relations Act, 61 Stat. 136 *et seq.*, 29 U.S.C. § 141 *et seq.* These provisions are reprinted in Appendix B, *infra.*

STATEMENT OF THE CASE

A. The Suspension of Tobin; the Union's Charge; the Company's "Grievance" and Demand for Arbitration

Respondent United Aircraft Corporation (hereinafter the Company) is an employer engaged in interstate commerce. Petitioner, Canel Lodge No. 700, International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter the Union), is the collective bargaining representative of the Company's employees at its Middletown, Connecticut, plant.

On December 30, 1969, Theodore Tobin, an employee of the Middletown plant, who is also a union steward, was given a one-day disciplinary suspension by the Company, allegedly for violating, on December 15, Company rules and a contract clause prohibiting the solicitation and collection of union dues-deduction cards on working time (R. 5). Neither Tobin nor the Union filed a grievance within five working days, nor, indeed, at any later time, challenging the suspension as a breach of the agreement (R. 126). They elected instead to challenge the suspension solely as a statutory violation, and to seek relief exclusively through the NLRB. (R. 126). This was done by the Union's charge filed with the NLRB on January 8, 1970, alleging that the Company's suspension of Tobin was discrimination violative of section 8(a)(1) and 8(a)(3) of the Act and that the asserted reason for the suspension—the alleged conduct of Union business on Company time—was a pretext (R. 30-31).

The Company received a copy of the charge on January 12, 1970 (R. 25). The following day, the Company wrote a letter to the Union as follows (id.):

> "We hereby notify you that the company is filing a grievance concerning the suspension of [Tobin] for violations of company rules on December 30, 1969 . . .
>
> "It is the company's position that the suspension of Mr. Tobin was for just cause. We were first advised that the union contended that Mr. Tobin's suspension was not for just cause when we received a copy of the charge on January 12, 1970, which the union filed with the National Labor Relations Board."

The Union responded to this letter, on the same day, as follows (R. 26):

> "The Union contends that the Tobin suspension was *illegal,* as a violation of the National Labor Relations Act, not merely that it was for a lack of 'just cause'.
>
> "We decline to consider this matter in the third step." (Emphasis in original).[2]

The Company persisted in its demand for processing of its "grievance" (R. 27-28), and the Union refused (R. 29).

On January 29, 1970, the Company demanded arbitration of its "grievance." (R. 32). In a letter dated February 18, 1970, the Union refused to arbitrate, explaining (R. 33-34):

> "Reference is made to your letter of January 29, 1970. As you are aware, the General Counsel of the National Labor Relations Board, after investiga-

---

[2] The agreement provides that "grievances filed by the Company or the Union, may initially be presented at [the third] step." (R. 13).

tion, has issued a complaint against the Company alleging that its suspension of Mr. Tobin was an unfair labor practice. The National Labor Relations Board has authoritatively rejected your theory that the Company is entitled to treat as a 'grievance,' within the meaning of Article VII, Section 1, and Step 3(b), and Step 4, and Article VII, Section 3(a)(1) of the collective bargaining agreement, a claim by the Union that discharge or suspension of a steward for union activity is an unfair labor practice. Such a claim poses a question of construction and application of the governing federal statute, rather than a question of 'interpretation, application or compliance with the provisions of this agreement,' to which, as Section 1 demonstrates, the grievance and arbitration provisions of the agreement are confined.

"Since, in our view, the Company is not entitled or empowered to subject the question of the legality of Tobin's suspension to the grievance and arbitration procedure, we reject your proposal that an arbitrator be designated to consider the matter."

B. The Relevant Provisions of the Agreement

The collective bargaining agreement establishes a grievance procedure for the resolution of "difference[s] aris[ing] between the Company, the Union or any employee concerning the interpretation, application or compliance with the provisions of this agreement" (R. 11). The agreement provides that employees will not be discharged or suspended except for "just cause" (R. 24),[3] and that:

---

[3] Another provision of the agreement states:

"The Company and the Union recognize that employees covered by this agreement may not be discriminated against because of race, color, sex, age or religious belief, nor because they engage in activities which are protected by the National Labor Relations Act as amended." (R. 9).

> "Any employee shall have the right to appeal his discharge or suspension through the grievance procedure within five (5) working days from the date thereof. Failure to file such an appeal shall prohibit any further consideration of such discharge or suspension." (R. 24).

The Company's "grievance" was first tendered after the time had expired in which Tobin or the Union could have challenged the suspension under the agreement.

C. The Proceedings Below

1. The Company Institutes This Action

On March 20, 1970, more than a month after the Union's refusal to arbitrate, but less than two weeks before the Union's 8(a)(3) charge was to be heard by a Board Trial Examiner (R. 143), the Company instituted the present action under Section 301 of the Act, by filing a "Petition to Compel Arbitration" (R. 4-6). The Petition sought an order compelling the Union to arbitrate "a dispute concerning the disciplinary suspension of one Theodore B. Tobin" (R. 4). The Company explained its purpose in seeking arbitration of the propriety of its own suspension of Tobin: The NLRB has a practice, in some cases, of deferring to arbitrators' awards; the Company wished to have an arbitrator determine whether its suspension of Tobin was for "just cause," so that it could request the NLRB to "defer" to the arbitrator's award rather than adjudicate the Union's 8(a)(3) charge on the merits (Petitioner's Memorandum in Support of Petition to Compel Arbitration, pp. 10-14).

2. The Company Utilizes This Action To Delay the NLRB Proceeding Against It

Consistent with its avowed purpose, the Company has persistently sought to utilize the pendency of its action, and the orders of the courts below, to delay the NLRB's unfair labor practice proceedings against it. When the Union's discrimination charge came on for hearing before a Board Trial Examiner, on April 1, 1970, the Company moved that further proceedings be stayed pending disposition of this suit.[4]

The hearing lasted one day, and upon its completion the Trial Examiner took the entire case under advisement, including the Company's motion. On May 15, 1970, the Trial Examiner entered an order staying further proceedings as requested by the Company (R. 113-115). Both the Union and the Board's General Counsel requested permission to file special appeals to this ruling (R. 118-123, 125). On June 3, 1970, the Board granted the special appeals, reversed the Trial Examiner's order, and "directed" him "to proceed forth-

---

[4] The Company explained that its purpose in filing the suit was to circumvent the Board's rejection in earlier cases between these parties of its contention that the Union was required to submit to duplicative arbitration:

> "TRIAL EXAMINER: What happened to these cases? Did they go to Court?
>
> "MR. WELLS: They are all pending in the Second Circuit. As Counsel noted in those cases, the Company tried through the National Labor Relations Board to implement a decision on these as a resolution of these disputes by bargaining and by arbitration, and as those decisions indicate, the Board's not impressed. Now, in this particular case we decided the Board isn't going to help us any, we'll go to the Court and see if we can get our contract enforced by the Court" (R. 96-97).

with with his decision on the merits of the proceeding" (R. 125).

When the District Court decision ordering arbitration was issued (see pp. 9-10 *infra*), the Board Trial Examiner had not yet issued his decision on the charges against the Company. Two days later, on June 19, 1970, the Company filed another motion with the Trial Examiner "to defer action on the complaint pending arbitration." The Company argued that the Board, if it proceeded to decide the 8(a)(3) case, "would . . . frustrate and interfere with the arbitrator who must decide the same contested issues". On June 24, the Trial Examiner denied the motion, but stated that he would "suspend any further action on the merits until the [Company] has exhausted its right to appeal to the Board from this ruling . . ." (R. 143). The Union requested permission to file a special appeal from this "suspension" of further action (R. 144-145); the Company requested permission to file a special appeal from the denial of its motion. On July 1, the Board granted the Union's appeal and "directed" the Trial Examiner "to decide and issue his decision without further delay" (R. 146). On the following day, by telegraphic order, the Board denied the Company's request to appeal.

Thereafter the Trial Examiner issued his decision on the merits, finding that the Company had violated Sections 8(a)(1) and 8(a)(3) in suspending Tobin. The Trial Examiner stated that there was "no need to resolve" the issue whether Tobin had violated the Company's rules for, assuming *arguendo* that he had, that was not "in fact the motivating reason for the suspension of Tobin." (R. 153, 154). The Trial Ex-

aminer based his conclusion that the Company was actually discriminatorily motivated in part upon "the pattern of discrimination against Union stewards established by the Board's findings in certain earlier cases." (R. 157). The Trial Examiner directed the Company to provide Tobin back pay for the period of suspension and further ordered the Company to cease and desist from discriminating against employees because of their Union activities (R. 158-159).

While the case was pending before the Board on exceptions to the Trial Examiner's decision, the court below affirmed the District Court. Thereupon, the Company tried again. On December 31, 1970, it filed a motion with the Board requesting it to defer its decision until the Union had complied with the court decision by proceeding to arbitration on the grievance filed by the company. By Decision and Order issued February 22, 1971, that motion was denied by the Board as "without merit." (Appendix C, p. C 2, n. 1, *infra*). In that Decision the Board adopted the remedial order against the Company which the Trial Examiner had recommended, and approved his finding of the Company's illegal motivation. But the Board added that the company's action was illegal also under the principle of *Labor Board* v. *Burnup & Sims,* 379 U.S. 21, because "Tobin was following the terms of the contract" and was engaged in protected activity. *Id.,* pp. C2-C3, *infra.*

3. The District Court Orders Arbitration

On June 17, 1970, the District Court (Clarie, J.), decided that plaintiff was entitled to an order directing arbitration. The court deemed controlling decisions which emphasize enforcement of arbitration agreements

and broad reading of arbitration clauses, even when the sole consequence is a duplicative proceeding, provided the power of the NLRB to exercise its independent jurisdiction is unimpaired. The District Court rejected the Union's contention that the contract should not be construed as empowering the Company to file a "grievance" over its *own* alleged statutory violation *i.e.,* the allegedly illegally motivated suspension, on the theory that arbitration would determine the wholly different question "whether or not the *employee's* conduct was justified under the terms of the contract." (App. A, p. 19a). (Emphasis added.) And it held that a construction of the contract which would leave the Union an option to proceed solely upon the statute, or upon the contract, or both, was inadmissible because that "would totally destroy * * * mutuality" (App. A, p. 15a). This, in the Court's view, would conflict with the philosophy of enforcing concomitant undertakings, expressed in *Boys Markets* v. *Retail Clerks,* 398 U.S. 235, 252.

4. The Court of Appeals Affirms the District Court's Order.

The Court of Appeals affirmed the District Court's order directing arbitration.

It first held that the contract required arbitration:

> "The district court found that the Company had presented a grievance cognizable under those provisions, and we agree. The Union argues that the dispute is over Tobin's disciplinary suspension, not over Tobin's alleged breach of the Company's rule and his alleged breach of the no solicitation clause in the contract. Only by a completely strained reading of the contract and a completely unrealistic definition of the dispute could the Court arrive at such a conclusion. Our duty is to

order arbitration where under any reasonable construction the contract would cover the grievance, not to strain for unreasonable constructions. *International Union of Electrical Workers* v. *General Electric Co.*, 407 F.2d 253, 256 (2 Cir. 1968)." (App. 5a)

The Court then held, albeit without reference to § 10(a) of the Act, that public policy does not militate against enforcement of the contract as so construed. (App. A, pp. 5a-6a):

> "Next the Union contends that if the agreement, properly interpreted, makes subject to arbitration alleged Company conduct which would be an unfair labor practice, such an agreement is unenforceable as against public policy, because it permits the arbitrator to invade the province of the Board. That contention has long since been foreclosed. [citing cases.]
>
> * * * * * * * * *
>
> The possibility of * * * deferral [to arbitration] by the Board is the basis for the Union's final contention, that the existence of concurrent jurisdiction coupled with the possibility of deferral by the Board, may in some cases deprive the Union of any advantage which might be gained by its choice of a forum. It is clear that an employer may not resist contract arbitration on the ground that it prefers the Board as a forum *Carey* v. *Westinghouse Electric Corp., supra* at 268; *Smith* v. *Evening News Ass'n, supra.* We perceive no compelling reason why a Union which has executed an arbitration agreement should be in a more favorable forum shopping position. The Union argues that the district court has exacted a price for its resort to the processes of the National Labor Relations Act before the Board, in that it is being forced simultaneously to arbitrate. This argument

is specious, for the court had nothing to do with the execution of the collective bargaining agreement in which the Union undertook to arbitrate. Where there is such an agreement there is concurrent contract and Board jurisdiction."

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW IS INCONSISTENT WITH THE DECISIONS OF THIS COURT, UNDERMINES THE NATIONAL LABOR POLICY, AND MULTIPLIES LITIGATION.

INTRODUCTION

This is one of the class of cases which, in *Smith* v. *Evening News Assn.*, 371 U.S. 195, 197, the Court said it would "face * * * when they arise," namely, "situations in which serious problems * * * arise from both the Board and the courts having jurisdiction over acts which amount to an unfair labor practice." *Smith* and its progeny held that the statute creates concurrent remedies before the Board on the one hand, and courts or arbitrators on the other, when it is asserted that the same conduct allegedly violates both the statute and the collective bargaining agreement. In that event, this Court held, the alternative rights and remedies are complementary, and the plaintiff has the right to choose the forum or forums in which he wishes to assert his interests. The decision below gives rise to "serious problems" because the Court of Appeals, despite this Court's cautionary reservation in *Smith,* extended concurrent jurisdiction to situations, such as the present, where the accused party asserts the right to arbitrate for the sole purpose of defeating the other party's right to seek relief for an unfair labor practice *from the Board alone.* The Court thus followed the formula of *Smith*—"concurrent jurisdiction"—to defeat its substance—which is to give the choice to the putative victim. That choice, granted by Congress, is characterized below as "forum shopping" and the party

charged with having committed an unfair labor practice is actually held to be entitled to an *equally* "favorable forum shopping position" as its putative victim (App. 6a). One result, as we shall show, is to channel into arbitration matters which are not within the objectives of § 203(d), as defined by this Court. A second consequence, also discussed below, is to burden recourse to the unfair labor practice remedy which § 10(a) provides and guards against private agreements to arbitrate, contrary to this Court's decisions. Perhaps the most serious adverse consequence of the decision below is also the most obvious: it promotes multiplicity of litigation—"the least desirable of all solutions * * * a necessity for suit in both forums" *U. S. Bulk Carriers* v. *Arguelles,* 39 U.S.L.W. 4101, 4106 (Harlan, J. concurring).

I. SECTION 203(d) DOES NOT REQUIRE ARBITRATION OF THE COMPANY'S "GRIEVANCE."

In directing arbitration, the courts below took liberties with both the "grievance" and the agreement. For, as construed below, the issue to be arbitrated 1) is not the grievance framed by the Company[5]; and 2) is

---

[5] Nothing could be clearer than that the Company's "grievance," its demand for arbitation, and its Petition in the District Court, all sought a determination of the propriety of its own conduct, not Tobin's. The affidavit of the Company's Industrial Relations Administrator filed in support of the Petition stated:

> "4. The suspension of Theodore Tobin . . . and the dispute between the Company and the Union which resulted therefrom was referred to the grievance procedure by the Company on January 13, 1970 . . ." (R. 7)

Tobin's alleged misconduct occurred on December 15, 1969, two weeks prior to his suspension (R. 126). But the "dispute" which the Company sought to arbitrate was one which "resulted . . . from" the suspension. Manifestly, that "dispute" related to the propriety of the Company's conduct, not Tobin's.

excluded from arbitration by the terms of the agreement itself.[6] Cf. *Atkinson* v. *Sinclair Rfg. Co.*, 370 U.S. 238, 241. Of course, such error, while unfortunate for the losing party[7] is not, as such, justification for review by this Court. But review *is* warranted, where, as here, the lower courts' construction is due to a grave misconception of the underlying standard. Both courts below considered themselves bound by decisions originating in the *Steelworkers* trilogy, which state a broad

---

[6] Many collective bargaining agreements make the scope of arbitration coterminous with the scope of the grievance procedure. This one, however, does not. Article VII, Section 3 (a) lists thirty-nine issues which "shall be submitted to arbitration upon the request of either party" (R. 15-19). Article VII, Sections 3(b) and (c) state that all other grievances are arbitrable only by mutual consent (R. 19).

One of the thirty-nine issues made arbitrable at the behest of either party is "A grievance concerning the discharge or disciplinary suspension of an employee" (R. 15), and it was under this provision that the Company sought to arbitrate the propriety of its disciplining of Tobin. However, the issue which the courts below ordered to arbitration—Tobin's alleged violation of Article IV and of Appendix A, Section 1 of the Agreement—is not made arbitrable by the agreement.

[7] The result below is particularly harmful to petitioner because its sanctions the Company's plan to compel arbitration whenever the Union accuses it of unfair labor practices. The Company tried repeatedly before this case arose to compel arbitration in such situations by (a) filing refusal to bargain charges against the Union (App. A pp. 23a-27a), and (b) raising the Union's refusal to arbitrate as a defense to unfair labor practice charges against the Company (App. A pp. 28a-33a). Indeed, after the decision below, the Company obtained an order from the District Court (from which the Union has appealed) compelling a sister Local to arbitrate the allegedly discriminatory discipline of another steward, named Sullivan. *United Aircraft Corporation* v. *Hartford Aircraft Lodge No. 743, International Association of Machinists and Aerospace Workers, AFL-CIO*, No. 14,206. On February 16, 1971, the Second Circuit granted a motion for stay pending appeal in that case, No. 71-1117.

policy in favor of arbitration. But that policy does not govern—indeed it is defeated—where arbitration has no purpose except to influence the decision of the tribunal charged with determining statutory violations. This distinction is drawn in the very opinion which first declared the rule of construction upon which the courts below relied:

> Thus the run of arbitration cases, illustrated by Wilko v. Swan, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 becomes irrelevant to our problem. There the choice is between the adjudication of cases or controversies in courts with established procedures or even special statutory safeguards on the one hand and the settlement of them in the more informal arbitration tribunal on the other. In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. *Steelworkers* v. *Warrior & Gulf N. Co.,* 363 U.S. 574, 577-578 (footnotes omitted).

The arbitration which was directed in this case however is not a "substitute for industrial strife";[8] rather the avowed purpose of moving party is to utilize arbitration as a "substitute for litigation," *before the Board.* Under these circumstances, *Wilko* v. *Swan,* not *Warrior & Gulf,* is controlling.

Cases such as *United Steelworkers* v. *American International Aluminum Corp.,* 334 F.2d 147, 152 (5 Cir.),

---

[8] There is no suggestion of a threatened strike by the union over the suspension of Tobin, or of a lockout by the Company due to Tobin's alleged infraction of the Company's rules or the agreement. (See App. A, p. 27a).

cited by the District Court, (App. A, p. 17a), are entirely consistent with this analysis. They hold that arbitration will be directed where the movant asserts that the same action of its adversary is both an unfair labor practice and a breach of contract. This result is reached not out of uncritical obeisance to the benefits of arbitration, but in order to assure that the aggrieved party can obtain, as was said in *American International,* "all merited relief." 334 F.2d at 152.[9] This purpose is frustrated, not promoted, by directing arbitration at the insistence of the party charged with the statutory violation. No principle of mutuality requires courts to treat the wrongdoer and his victim with fine impartiality.[10]

---

[9] This effectuates the Congressional intent in eliminating the word "exclusive" from Section 10(a)—to provide an additional "option," (*Amazon Cotton Mills Co.* v. *Textile Workers Union,* 167 F. 2d 183, 187 (4 Cir.)), to "the aggrieved party." *Hutchings* v. *United States Industries, Inc.,* 428 F.2d 303, 313, n. 9 (5 Cir.). The only limitation is that dual proceedings may not culminate in "duplicate compensation." *Automobile Workers* v. *Russell,* 356 U.S. 634, 646.

[10] The District Court was of the view that "mutuality" was required by this Court's decision in *Boys Markets* v. *Clerks' Union,* 398 U.S. 235, 252 the following portion of which the court below quoted immediately after its "mutuality" discussion (App. A p. 15a):

> "Clearly employers will be wary of assuming obligations to arbitrate specifically enforceable against them when no similarly efficacious remedy is available to enforce the concommitant under taking of the union to refrain from striking."

The District Court plainly misread *Boys Markets.* This Court was there concerned that an employer who agrees to arbitrate union claims that the *employer* has violated the agreement has a "similarly efficacious remedy" when it contends that the *union* has breached the agreement (i.e., a right to enjoin strikes in breach of contract). The Court was not saying that in exchange for an employer's agreement to arbitrate contractual disputes the union must submit to arbitration of alleged employer *statutory* violations.

In short, the principles underlying the decisions relied on below are entirely beside the point where arbitration is sought, not to resolve a general dispute "arising over the application or interpretation of an existing collective-bargaining agreement" [Sec. 203(d)], but as a ploy in litigation before the NLRB. The rule of construction which the court should have applied is that the parties will not be presumed to have committed to arbitration disputes which the aggrieved predicates solely on the statute, absent a clear, explicit, statement in the collective bargaining contract directing an arbitrator to hear and determine *such disputes. Vulcan Materials Co.* v. *United Steelworkers,* 434 F.2d, 446, 458, (5th Cir.) pet. for cert. pending, No. 1121 this Term. See also *Twin Excavating Co.* v. *Local Union No. 731,* 337 F.2d 437 (7th Cir.); *United States Steel Corp.* v. *Seafarers Int'l. Union,* 237 F. Supp. 529, 532 (E.D. Pa.): *Silvercup Bakers Inc.* v. *Fink Baking Corp.,* 273 F. Supp. 159 (S.D.N.Y.).

II. SECTION 10(a) FORBIDS COMPELLING THE UNION TO ARBITRATE THE COMPANY'S "GRIEVANCE."

Contrary to the assumption of the courts below, the declaration in Section 10(a), that the Board's "power shall not be affected by any other means of adjustment or prevention that has been or may be established *by agreement,* law or otherwise," is not exhausted merely by respecting the independence of the Board's jurisdiction. The guarantee renders unenforceable any law or private agreement which imposes a "financial burden," or in any way conditions or qualifies the right of an aggrieved party to "unimpeded access" to the Board. *Nash* v. *Florida Industrial Comm'n,* 389 U.S. 235, 238-239; *NLRB* v. *Marine Workers,* 391 U.S. 418, 424. An agreement which allows the accused violator

to impose upon the party aggrieved the "expense of arbitration" (*NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 438), as the price of access to the Board, is incompatible with this guarantee. Moreover, in the words of Judge Marvin Frankel, "[i]t would be at least a burdensome incongruity to hold that a plaintiff seeking redress for [statutory] wrongs must litigate the same charges twice, once before an arbitrator and again [before the Board]." *Silvercup Bakers, Inc.* v. *Fink Baking Corp.*, 273 F. Supp. 159, 163 (S.D.N.Y.).

The policy of Section 10(a) militates against construction of a contract which would empower the alleged violator to compel the party aggrieved to submit to duplicative contract arbitration, and forbids enforcement of any contract clause which unequivocally vests such power in the alleged wrongdoer. For the effect is to transform the aggrieved party's option into an obligation, and that is to deprive the aggrieved party of the "substantial right" (*Wilko* v. *Swan*, 346 U.S. 427, 437-438; *U.S. Bulk Carriers* v. *Arguelles*, 39 U.S. L. Wk. 4101, 4104 (Harlan J. concurring)), "to decide what law he will rely upon" (*The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25) and to "select the forum." *Boyd* v. *Grand Trunk Western R. Co.*, 338 U.S. 263, 266.

In the only other case we have found where the alleged offender (there a union) attempted to compel duplicative arbitration in such circumstances, arbitration was stayed on motion of the employer "pending the conclusion of the proceedings before the National Labor Relations Board." *Kentile, Inc.* v. *Local 457, Rubber Workers*, 228 F. Supp. 541 (E.D.N.Y. 1964) See also, Dunau, *Three Problems In Labor Arbitration*, 55 VA L. Rev. 427, 441 (1969).

In sum, Section 301 confers "a right * * * and not a duty" to place the claim "before a grievance committee or before an arbiter." *U. S. Bulk Carriers* v. *Arguelles, supra,* 39 U.S. L.W., at 4102. It provides "only an optional remedy to" victims of statutory violations (*id.,* at 4103). Section 10(a), in turn, forbids transformation of that "right" or "option" into a "duty" by *"agreement."*

All of the prior cases in this Court, and all the cases relied on below, rejected objections to arbitration by a party whose conduct was, or could have been, challenged as an unfair labor practice or otherwise subjected to the Board's authority. To hold that overruling the objections of *such* a party requires overruling objections to duplicative arbitration by the party claiming to have been victimized by the other's statutory violation is not to "equalize" obligations or establish "mutuality," but, instead, to "turn the blade inward." *Graham* v. *Brotherhood of Firemen,* 338 U.S. 232, 237.

We submit that a petition to compel arbitration by the alleged violator should be dismissed whenever it appears that the aggrieved party's claim is based upon the statute, rather than the contract, for in such cases the wrongdoer's only possible objective is to influence the Board to exercise its discretion not to proceed. Use of the judicial process for such a purpose—to influence the decision of an administrative agency in a matter committed to its discretion—was expressly condemned by this Court in *Public Service Commission of Utah* v. *Wycoff Co.,* 344 U.S. 237, 246.

> "[T]he declaratory judgment procedure will not be used to pre-empt and pre-judge issues that are committed for initial decision to an administrative

> body or special tribunal . . . *It would not be tolerable, for example, that declaratory judgments establish that an entrepreneur is not in interstate commerce in order to forestall proceedings by the NLRB* . . . or many agencies that are authorized to try and decide such an issue in the first instance. . . . Responsibility for effective functioning of the administrative process cannot be thus transferred from bodies in which Congress has placed it to the courts." (Emphasis added)

In light of the "superior authority of the Board" under § 10(a), *Carey* v. *Westinghouse Corp.* 375 U.S. 261, 272, a declaratory judgment proceeding before an arbitrator is equally intolerable.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted and the judgment below reversed with instructions to dismiss the petition to compel arbitration.

Respectfully submitted,

PLATO E. PAPPS
Machinists Building
Washington, D. C. 20036

MOZART G. RATNER
818 18th Street, N. W.
Washington, D. C. 20006

APPENDIX

APPENDIX B

Statutes Involved

The relevant provisions of the Labor Management Relations Act, 1947, are:

Section 301(a): 61 Stat. 156, 29 U.S.C. § 185(a)

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Section 203(d): 61 Stat. 153, 29 U.S.C. § 173(d)

> "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases."

The relevant provisions of the National Labor Relations Act, as amended, are:

Section 10(a): 49 Stat. 453, 29 U.S.C. § 160(a)

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *"

Section 7: 49 Stat. 452, 29 U.S.C. § 157

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Section 8(a): 49 Stat. 252, 29 U.S.C. § 158(a)

"It shall be an unfair labor practice for an employer—

(1) "[T]o interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;"

* * * * *

(3) "[B]y discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *"

APPENDIX C

188 NLRB No. 96

D—4665
Middletown, Conn.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 1-CA-6967

UNITED AIRCRAFT CORPORATION (PRATT & WHITNEY DIVISION)

and

CANEL LODGE 700, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

Decision and Order

On July 13, 1970, Trial Examiner Sidney Sherman issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent, the General Counsel, and the Charging Party filed exceptions to the Trial Examiner's Decision and supporting briefs, and the Charging Party filed a reply brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in the case, including Respondent's motion to include the decision of the United States Court of Appeals for the Second Circuit

and opposition of Charging Party to Respondent's motion to defer decision,[1] and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner as modified below.

We find that Tobin, a union steward, was engaged in protected concerted activity at the time of the incident which gave rise to this proceeding. At that time, Tobin was assisting the Union and acting in his capacity as the Union's representative in informing employee Tibbits that, in accordance with the provisions of the contract, this could not be done on company time and dropped the cards on a table. Whether or not Respondent believed that, except for the intervention of a supervisor, Tobin would have reclaimed the cards is mere conjecture. Likewise one can only speculate as to whether or not Tobin ever entertained such a thought. In view of his throwing the cards on the table, we find that Tobin was following the terms of the contract, this is clearly protected concerted activity, and Respondent's suspicion or good-faith belief as to what Tobin may have done is not relevant. Accordingly, we find contrary to the Trial Examiner that the rule of law laid down in *Burnup and Sims, Inc.*, 379 U.S. 21, is applicable herein.

---

[1] On December 31, 1970, Respondent filed with the Board a motion in which it again requested deferment of a decision of the merits of the instant case until such time as the Charging Party complies with the decision of the United States Court of Appeals for the Second Circuit issued December 11, 1970. In its decision the court affirmed an order of the United States District Court for the District of Connecticut directing the Charging Party to proceed to arbitration pursuant to the terms of a collective-bargaining agreement. We deem the motion to be without merit and hereby deny it.

Although Member Brown would normally defer to grievance-arbitration procedures in the type of situation involved here, he concurs in the present case in view of the posture of related Board decisions in 179 NLRB No. 160 and 180 NLRB No. 49.

While so finding, we do agree with the Trial Examiner's finding that the weight of the evidence herein establishes discriminatory motivation on the Respondent's part in its suspension of Union Steward Tobin. In addition to the disparity of treatment as illustrated by the written and oral reprimands given to the other empolyees involved in the incident, the record shows that a pattern of discrimination against union stewards has been perpetrated by the Respondent in prior cases.[2] Moreover, the Respondent's admission that it meted out harsher treatment against Tobin because of his union status convinces us that the Respondent's suspension of Tobin was unlawfully motivated and for this reason also constitutes a violation of Section 8(a)(3) and (1) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner and hereby orders that the Respondent, United Aircraft Corporation (Pratt & Whitney Division), Hartford, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C., Feb. 22, 1971.

JOHN H. FANNING, *Member*
GERALD A. BROWN, *Member*
HOWARD JENKINS, JR., *Member*
NATIONAL LABOR RELATIONS BOARD

(SEAL)

---

[2] *United Aircraft Corporation (Pratt & Whitney Division)*, 180 NLRB No. 49, and case cited therein in fn. 1.

[Attached to this decision is the Trial Examiner's Decision printed in App. A, pp. 40a-52a.]

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
MAR 19 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1416

CANEL LODGE NO. 700, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner,

v.

UNITED AIRCRAFT CORPORATION, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

SUPPLEMENTAL MEMORANDUM FOR PETITIONER

PLATO E. PAPPS
Machinists Building
Washington, D. C. 20036

MOZART G. RATNER
818 18th Street, N. W.
Washington, D. C. 20006

Counsel for Petitioner

March 19, 1971

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1416

CANEL LODGE NO. 700, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner,

v.

UNITED AIRCRAFT CORPORATION, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

SUPPLEMENTAL MEMORANDUM FOR PETITIONER

Pursuant to Rule 24(5) of this Court, petitioner submits this Supplemental Memorandum to invite this Court's attention to a decision of the National Labor Relations Board reported after the Petition was filed, which bears directly on the Question Presented. The decision is *Association of Packers & Drivers Union (Guy's Foods, Inc.),* 188 NLRB No. 85, 76 LRRM 1380. We reprint the Board's decision as an Appen-

dix to this memorandum, and shall here discuss briefly its holding and relation to the present Petition.[1]

In *Guy's Foods* the NLRB decided that a union had restrained and coerced an employee in violation of § 8(b)(1)(A) of the Labor-Management Relations Act of 1947 by advising her that it will process her grievance through the contract machinery only if she withdraws an unfair labor practice charge filed with the Board regarding the same employer action. In the Board's view:

> "* * * Respondent Union's insistence that [the employee] give up her statutory right of access to the Board or lose her contractual right to invoke a grievance procedure made on her behalf was clearly coercive within the meaning of the Supreme Court's decision in NLRB v. Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO [*Marine Workers*], 391 U.S. 418." (p. 2a, *infra*)

The Board relied heavily on this Court's language in *Marine Workers:*

> "* * * that the overriding public interests (sic) makes unimpeded access to the Board the only healthy alternative * * *." (*Ibid.*)

Finally, the Board held that the responsibility of the Union to protect its members' interests, its duty of fair representation and its "legitimate discretion" to process grievances are not,

> "* * * justification to impede, deter, or interfere with an employee's right to come to this Board with an unfair labor practice charge." (*Ibid.*)

---

[1] The opinion referred to herein as that of the Board is that of Members Fanning and Jenkins. Member Brown wrote a separate concurring opinion. Chairman Miller dissented. Member Kennedy did not participate.

We submit that the Board's reasoning in *Guy's Foods* parallels that in Part II of our Petition, wherein we urge that Section 10(a) of the Act forbids enforcement of an agreement which compels a union to arbitrate a matter with respect to which it has filed an unfair labor charge. We there argue:

> "The guarantee renders unenforceable any law or private agreement which imposes a 'financial burden,' or in any way conditions or qualifies the right of an aggrieved party to 'unimpeded access' to the Board. *Nash* v. *Florida Industrial Comm'n,* 389 U.S. 235, 238-239; *NLRB* v. *Marine Workers,* 391 U.S. 418, 424." (Pet. p. 17)

The Board has now shown that it reads *Marine Workers* the same way. Moreover, the Board's reading of *"any coercion"* (Board's emphasis) establishes *a fortiori* that compelling the charging party to arbitrate is also illegal. The grievant in *Guy's Foods* was deprived only of a second bite at the apple which, while perhaps increasing the probability of recovery, could not result in a duplicate recovery. (See Pet. p. 16, n. 9). On the other hand, enforcement of the arbitration agreement here not only creates for the Union a risk that the Board may defer to the arbitrator, rather than provide a *de novo* determination in the grievant's preferred forum (the company's precise objective here), but inevitably places on the Union an additional unwarranted burden—the cost of the arbitration. (See Pet. pp. 17-18).

With respect to countervailing considerations, the respondent in *Guy's Foods* was in a stronger position than the Company here. For the union there asserted, and the dissenting Chairman of the Board agreed, that its refusal to process the grievance was the exercise of "legitimate discretion" in fulfilling its statutory obligation as bargaining representative. In this case, on the

other hand, the court below held that it was sufficient justification to compel arbitration that the Company had (in the court's view) obtained that right by agreement. Not only is a voluntary agreement not on the same legal level as a statutory right or duty, but by the terms of Section 10(a) such an agreement cannot be allowed to impinge upon freedom of access to the Board. Indeed, the precise holding of *Marine Workers* was that a union constitutional provision which required exhaustion of union remedies prior to filing a Labor Board charge was unenforceable because it was contrary to public policy. 391 U.S., at 424. The agreement to arbitrate herein can fare no better under Section 10(a).

One final point is notable about *Guy's Foods*. It reinforces our position that the alternative forums recognized by *Smith* v. *Evening News* are for the benefit of the aggrieved party, who "has the right to choose the forum or forums in which he wishes to assert his interests." (Pet. p. 12). If, as the Board held in *Guy's Foods,* the aggrieved party must be allowed his *choice* to use *both* forums, despite the public policy against duplicative litigation, and in favor of responsible exercise by unions of their obligations as bargaining representatives, petitioner cannot be denied the right, which offends neither policy, to choose to proceed exclusively before the Board.

Respectfully submitted,

PLATO E. PAPPS
Machinists Building
Washington, D. C. 20036

MOZART G. RATNER
818 18th Street, N. W.
Washington, D. C. 20006

Counsel for Petitioner

APPENDIX

APPENDIX

188 NLRB No. 85 D—4485
Kansas City, Mo.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 17—CB—725

ASSOCIATION OF PACKERS & DRIVERS UNION
(GUY'S FOODS, INC.)

and

MICHAEL A. GORDON, an Attorney for HELEN MEALY,
an Individual

Decision and Order

On June 29, 1970, Trial Examiner Morton D. Friedman issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices and recommended that these allegations of the complaint be dismissed. Thereafter, the Respondent and the General Counsel filed exceptions to the Trial Examiner's Decision together with supporting briefs.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner as modified below.

We agree with the Trial Examiner that Respondent Union violated Section 8(b)(1)(A) by telling employee Helen Mealy on two separate occasions that her grievance against the Employer would not be processed unless Mealy

withdrew unfair labor practice charges then pending before the Board.

Contrary to our dissenting colleague, we believe that Respondent Union's insistence that Mealy give up her statutory right of access to the Board or lose her contractual right to invoke a grievance procedure made on her behalf was clearly coercive within the meaning of the Supreme Court's decision in *N.L.R.B.* v. *Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO,* 391 U.S. 418. There, as noted in the dissenting opinion, the Court held that freedom of access to the Board should be "as great" as the freedom to petition any other department of Government. The Court held that *"any coercion"* (emphasis supplied) to defeat that access was beyond the legitimate interests of a labor organization. We take this language to mean what it says. Respondent Union was not privileged, however motivated and whether or not its judgment was "reasonable" or otherwise, to force Mealy to the difficult choice of giving up her grievance or her charge before the Board. We believe the Court made it clear in the above case, as quoted by our dissenting colleague, "that the overriding public interests makes unimpeded access to the Board the only healthy alternative. . . ." No responsibility of a union to protect its members' interests, no duty of fair representation, no "legitimate discretion" to process or not to process a grievance is justification to impede, deter, or interfere with an employee's right to come to this Board with an unfair labor practice charge. We cannot interpret the Supreme Court's decision, cited above, in any other way. In our opinion, the scope of discretion which our dissenting colleague finds inherent in the Union's representative capacity is so broad as to constitute a reversal of what the Court has held to be the proper interpretation of this statute. Nor can we agree that *Spielberg Manufacturing Company,* 112 NLRB 1080, is authority for dismissing this complaint. While

it is true that the Board in *Spielberg* "recognized" an arbitration award without passing itself upon the issue of alleged strike misconduct, in that case the matter had been fully litigated before a neutral tribunal and the Board could fairly say: "In summary, the proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." *Spielberg, supra* at 1082. No such parallel litigation has occurred here and *Spielberg* is therefore inapposite.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, as modified herein, and hereby orders that the Respondent, Association of Packers & Drivers Union, its officers, agents, and representatives, shall take the action set forth in the Trial Examiner's Recommended Order, as modified hereinafter:

1. Change paragraph 1(a) of the Trial Examiner's Recommended Order to read: "Restraining or coercing Helen Mealy, or any employee similarly situated, in the use of the processes of the National Labor Relations Board by informing her or any other employee that we will not process a grievance unless the employee withdraws charges the employee has filed with the Board."

2. In footnote 11 of the Trial Examiner's Decision change "10" to "20" days.

Dated, Washington, D.C.

.....
John H. Fanning, Member

.....
Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

MEMBER BROWN, concurring:

Respondent Union was ready and willing to take up a grievance respecting Mrs. Mealy's discharge through its contractual grievance-arbitration procedure with the Employer, but not if the very same matter was to be litigated in a concurrent unfair labor practice proceeding before the Board on Mrs. Mealy's charge against the Employer.

Even apart from time and money considerations, I readily appreciate that cogent reasons of sound labor relations may underlie a position against duplicative concurrent proceedings. However, the question presented is not whether national labor policy should impel the Board to defer to the parties' grievance-arbitration arrangements,[1] and thus not process an unfair labor practice charge in the face of such applicable arrangements. Involved here, rather, is whether, notwithstanding its good faith in the premises, Respondent Union could lawfully advise Mrs. Mealy that it would not prosecute her grievance unless she withdrew the charge.[2] With somewhat less certainty than I would desire, I agree with my colleagues that the *Marine Workers* and *Skura* cases are controlling.

Dated, Washington, D.C.

.....

Gerald A. Brown, Member

NATIONAL LABOR RELATIONS BOARD

---

[1] See, for example, my separate opinions in *Raytheon Company*, 140 NLRB 883, 888-891; *Thor Power Tool Co.*, 148 NLRB 1379, 1381-83; *The Hilton-Davis Chemical Company, Division of Sterling Drug, Inc.*, 185 NLRB No. 58, and cases cited therein (fn. 5).

[2] The Regional Director eventually dismissed the charge after investigation and did not issue a complaint.

CHAIRMAN MILLER, dissenting:

This case raises the question whether an employee representative violates Section 8(b)(1)(A) by either requesting or insisting (the facts present either possibility) that a discharged employee withdraw an individual 8(a)(3) charge as a precondition to the union's processing of the dischargee's grievance. It is my view that where, as in this case, the union acts for nondiscriminatory reasons it may require a represented employee to exhaust the contract grievance procedure prior to invocation of Board jurisdiction and decline to process a grievance if the grievant individually perseveres in an alternative forum.

The Trial Examiner and my colleagues are of the view that the *Skura*[3] and *Marine Workers*[4] decisions are precedent for a contrary view. I do not agree. Those cases involved action or threatened action by a union to penalize members for resorting to our processes, and the question presented was whether the union could compel its members to exhaust internal remedies and appeals within the union structure before complaining of such a penalty before this Board. The Supreme Court in the *Marine Workers* case said, as to that issue, *supra* at 424:

> A healthy interplay of the forces governed and protected by the Act means that there should be as great a freedom to ask the Board for relief as there is to petition any other department of government for a redress of grievances. Any coercion used to discourage, retard, or defeat that access is beyond the legitimate interests of a labor organization. That was the philosophy of the Board in the *Skura* case.

---

[3] *Local 138, International Union of Operating Engineers, AFL-CIO (Charles S. Skura)*, 148 NLRB 679.

[4] *N.L.R.B.* v. *Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO*, 391 U.S. 418 (1968).

Local 138, International Union of Operating Engineers, 148 NLRB 679; and we agree that the overriding public interest makes unimpeded access to the Board the only healthy alternative, except and unless plainly internal affairs of the union are involved.

The issue here, however, does not involve any act of union coercion, as I interpret the facts, but only a reasonable exercise of legitimate discretion in the complex and difficult area of employee representation. A union has a duty fairly to represent its constituents. *A fortiori,* it must have a wide range of discretion in choosing the means and manner of best effectuating that representation.[5] In exercising that discretion it must take into account many considerations. It may choose not to process one employee's grievance because the facts of his case are weak and an adverse result in his case holds the potential of creating a precedent adverse to employees who, in the future, may have cases presenting the same issue upon a more solid or appealing factual basis. It may choose not to press a given grievance or group of grievances in the belief that they can be more successfully resolved across the bargaining table in an approaching contract negotiation. It may choose not to pursue a member's alleged, but doubtful, claim of contract violation because a successful prosecution of his claim may prejudice a substantial group of members who have vested interests in a contrary interpretation of the same contractual provision. It may choose to employ counsel to try some arbitration cases, but not others.

In short, a responsible union must necessarily be free to make certain judgments about how best to protect its members' interests. Reasonable discretion in the exercise of that judgment must therefore necessarily be permitted, although I do not doubt the propriety of our in-

[5] *Ford Motor Co.* v. *Huffman,* 345 U.S. 330 (1953).

sisting that such judgments not be made upon premises running contrary to the basic guarantees of our Act. Clearly a union may not choose, for example, to process only the grievances of its ardent supporters and refuse to process the grievances of those who choose not to engage actively in union affairs.

But here, while it was originally alleged that the refusal to process the grievance was due to the Charging Party's activity on behalf of a rival union, the Examiner specifically found that this allegation was not proved, and in fact found the record "barren of any evidence" to this effect.

Instead, it appears that the Union sought to improve upon its chances of successfully resolving the grievance through the normal grievance procedures by not antagonizing the Employer by subjecting it to dual litigation of the same issue. Indeed, the Union had been told by the Employer's counsel that "the Employer probably would not sit down to arbitrate the matter as long as the charge was pending."

Faced with this set of facts, the Union was called upon to exercise the type of discretion to which I have alluded above. It could have dropped the grievance and offered legal assistance in prosecuting the charge before this Agency. It could have sued to force the Employer to arbitrate the grievance, while at the same time encouraging the employee to pursue the unfair labor practice charge. Or, as it did here, it could choose to offer its assistance to the grievant in the contractual grievance machinery if the grievant was willing to forego the second forum of Board procedures. This it apparently believed to offer the best opportunity for favorable consideration of the complaint by the Employer, and this was the alternative it chose. I cannot agree with my colleagues that the Union, by selecting this alternative, violated our Act.

There is a further reason I would find no violation of the Act in Respondent's refusal to process Mealy's grievance during the pendency of her unfair labor practice charge based on the same events. My colleagues, by analogizing this case to *Skura* and *Marine Workers,* imply that here, as in those cases, Respondent's actions contravened the public policy of free access to the Board. They overlook the fact that the Board itself has repeatedly held that the Act does not mandate the finding of unfair labor practices when the charging party or his representative has chosen the forum of grievance and arbitration. Thus, in *Spielberg Manufacturing Company,*[6] the Board, for policy reasons, declined to exercise its normal adjudicatory and remedial powers where a fair and regular arbitration proceeding had been held. *Spielberg* has been followed in many subsequent cases. Had Respondent pursued Mealy's case through the grievance and arbitration procedure here, the Board; following its own established precedent, would have stayed its hand in the collateral 8(a)(3) proceeding. Yet the majority holds that Respondent offended public policy by offering Mealy the same choice of forums the Board itself routinely offers litigants.

I would dismiss the complaint.

Dated, Washington, D.C.

.....

Edward B. Miller, Chairman

NATIONAL LABOR RELATIONS BOARD

---

[6] 112 NLRB 1080.

APPENDIX

NOTICE

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

To all Members of Association of Packers & Drivers Union

WE WILL NOT deny Helen Mealy, or any employee similarly situated, fair representation in the processing and handling of her grievance filed pursuant to the terms of our agreement with Guy's Foods, Inc., by informing Helen Mealy, or any other employee, that we will not process any grievance unless charges against Guy's Foods, Inc., are withdrawn.

WE WILL NOT restrain or coerce Helen Mealy, or any employee similarly situated, in the use of the processes of the National Labor Relations Board by informing her or any other employee that we will not process a grievance unless the employee withdraws charges the employee has filed with the Board.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of rights guaranteed in Section 7 of the Act.

ASSOCIATION OF PACKERS
& DRIVERS UNION
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 610 Federal Building, 601 East 12th Street, Kansas City, Missouri 64106, Telephone 816—374-5181.

TXD-390-70
Kansas City, Mo.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

Case No. 17-CB-725

ASSOCIATION OF PACKERS & DRIVERS UNION
(Guy's Foods, Inc.)

and

MICHAEL A. GORDON, an attorney for Helen Mealy, an individual

Ward Summerville, Esq., of Kansas City, Mo., for the General Counsel.

Don M. Jackson, Esq. and *George E. Kempke, Esq.*, of Kansas City, Mo., for the Respondent.

Michael D. Gordon, Esq. (*Jolley, Walsh & Gordon*), of Kansas City, Mo., for the Charging Party.

Trial Examiner's Decision

STATEMENT OF THE CASE

MORTON D. FRIEDMAN, Trial Examiner: Upon a charge filed by Michael D. Gordon, an attorney for Helen Mealy, an individual, herein referred to as Mealy, on October 29, 1969, the Regional Director for Region 17 of the Na-

tional Labor Relations Board, herein called the Board, issued a complaint on March 11, 1970, on behalf of the General Counsel of the Board against Association of Packers & Drivers Union, herein called the Union or the Respondent, alleging violations of Section 8(b)(1)(A) of the National Labor Relations Act, as amended (29 U.S.C. Sec. 151, *et seq.*), herein called the Act.

In its duly filed answer to the aforementioned complaint, the Respondent, while admitting certain allegations of the complaint, denied the commission of any unfair labor practices.

Pursuant to notice, a hearing on this case was held before me at Kansas City, Missouri, on April 23, 1970. All parties were represented and were afforded full opportunity to be heard, to introduce relevant evidence, to present oral argument, and file briefs. Briefs were filed by counsel for the General Counsel and the Respondent.[1] Upon consideration of the entire record, including the briefs of the parties, and upon my observation of each of the witnesses as they appeared before me I make the following:

Findings of Fact

I. The Business of the Employer

Guy's Foods, Inc., is engaged in the processing and wholesale distribution of food products. In the course and conduct of its business, Guy's Foods, herein referred to as the Employer, annually ships from its principal place of business in Kansas City, Missouri, directly to distribution facilities outside the State of Missouri goods and products of a value in excess of $50,000. It is

[1] Simultaneously with the filing of his brief, counsel for the General Counsel moved to correct the transcript of the testimony of the hearing in certain particulars. There being no opposition, this motion is granted.

stipulated and I find that the Employer is an employer engaged in interstate commerce within the meaning of Sections 2(6) and (7) of the Act.

II. The Labor Organization Involved

It is stipulated, and I find, that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Issues*

1. Whether the Respondent refused to process a grievance on behalf of Mealy unless Mealy withdrew an unfair labor practice charge she had filed against the Employer.

2. If the answer to issue 1. is in the affirmative, did such refusal on the part of the Respondent constitute restraint and coercion in violation of Section 8(b)(1)(A) of the Act?

3. If the answer to issue 1. is in the affirmative, whether the Respondent's refusal to process the grievance was motivated by reason of Mealy's activities on behalf of a rival labor organization?

B. *The Facts*

It is undisputed that Helen Mealy began working for the employer on August 8, 1962. During her employment Mealy was active in various union affairs. During 1968 she was a member of the Respondent's negotiating committee. For sometime Mealy was also a shop steward for the Respondent and was such during 1 year immediately preceding her discharge which occurred on June 9, 1969. Some years prior to her discharge, Mealy had acted as an observer at the polls in an election in which the Respondent was opposed by the American Bakery and Confectionery Union, herein referred to as ABC. However,

although Mealy acted as the observer for the ABC at that time, she later participated as shop steward and negotiating committee member for the Respondent. She testified that she never expressed to anyone during her period of activity on behalf of the Respondent that she favored the ABC.

Mealy operated a machine which packed nuts and candies. On June 20, 1969, Mealy was discharged. Immediately upon her discharge Mealy took a bus to the Regional Office of the Board where she filed an unfair labor practice charge against the Employer.[2]

Thereafter, on June 23, according to Mealy, she went to the offices of ABC where she had one of the business agents of that organization write out a grievance for her. Then, from the offices of ABC, Mealy called William R. Dummitt, the business representative of the Respondent Union.[3] On the telephone, Mealy told Dummitt that she had been fired and wanted to file a grievance against the Employer. Dummitt said that he would be at her home that afternoon. It is undisputed that Dummitt did come to her home the afternoon of the telephone call. Mealy first gave Dummitt a copy of the charge she had filed against the Employer and then gave him the grievance which had previously been written out for her by the ABC representative. She asked Dummitt to process the grievance. Mealy's version of Dummitt's answer differs markedly from the version given by Dummitt in

---

[2] The lawfulness of that discharge is not involved in this case. It appears that Mealy filed two unfair labor practice charges against the Employer both of which were dismissed upon investigation by the Regional Director.

[3] Dummitt testified, contrary to Mealy, that he received the call from Mealy on June 25 and not on June 23. He also testified that he first received the call from a man whom he could not identify and that then Mealy got on the telephone. As hereinafter discussed, I find that this difference in dates is inconsequential.

his testimony. According to Mealy, Dummitt answered her request that he process the grievance by stating, in Mealy's words "that he could not process the grievance because Guy's wanted me to drop the labor charges."

According to Dummitt, he told Mealy that he did not know what to do about the grievance, that he would have to check with Respondent's counsel about the charge. According to Dummitt he told Mealy this and explained to her that this was so because he had never run up against this before, that is, "a Board charge pending and a grievance on the same proceeding." Although on cross-examination Mealy admitted that Dummitt said something about having to see Union counsel, she insisted that Dummitt told her that he could not process the grievance unless she dropped the charge against the Employer. On the other hand, Dummitt admitted that in his pretrial affidavit he made the statement, "I told her I would have to check it and as long as she had the Labor Board charges we could not intervene."

On the basis of all of this conflicting testimony and on the basis that Dummitt admitted in his pretrial affidavit, made months before the hearing, that he did tell Mealy in effect that as long as she insisted on going through with the Board charge he could not intervene, I find and conclude, upon my observation of the witnesses, that Mealy's version is the more accurate of the two and that Dummitt in effect told Mealy he could not process the grievance unless she dropped the charge against the Employer.[4]

In any event, Dummitt did evidently go to the office of the Respondent's counsel after leaving Mealy's home.

---

[4] In coming to the foregoing conclusion, I have considered Dummitt's statement on the record, when faced with his pretrial affidavit, that the portion of the affidavit above quoted was a mistake which he had not noticed when he read and signed the affidavit. I do not credit the statement to the effect that Dummitt had not noticed a mistake in his pretrial affidavit.

There he discussed the matter with counsel. Dummitt testified that he was told by counsel that the Employer probably would not sit down to arbitrate the matter as long as the charge was pending.

A day or so later, according to Dummitt, June 27, he made contact with Mealy on the telephone at Mealy's new place of employment.[5] In the telephone conversation, according to Mealy, Dummitt asked her, again in her own words, "if I would drop the labor charges he would process the grievance." According to Mealy she refused to drop the charges and that was the full context of the conversation. Mealy has not heard from Dummitt since. Nor has she heard from anyone else connected with the Respondent.

According to Dummitt, he told Mealy that by reason of the fact that Mealy had a charge pending at the Board, they did not feel "that the Company would sit down and talk to us on the same charge with the charge before the Board." Then Dummitt testified "I told her that it would be up to her as to which way she wanted the Union to go." According to Dummitt, Mealy then said that she would let Dummitt know. Dummitt has at no time since then heard from Mealy.

On cross-examination Dummitt was asked the following question: "As a matter of fact, isn't it true that you told her," "It is up to you, if you want to drop the charges with the N.L.R.B. we will intervene?" Dummitt answered, "yes."

Inasmuch as the Mealy version of the conversation at Mealy's home has already been credited I find and conclude that Mealy's version of the telephone conversation at her place of employment is also the more accurate of

---

[5] Mealy testified that Dummitt called her a week or two later. However, in this respect I believe Dummitt's testimony is more accurate. In any event, the date of the telephone call is not critical.

the two versions and I conclude that what Dummitt stated to Mealy was in effect a restatement of his original position that the Respondent would process Mealy's grievance if and when Mealy would drop the charges against the Employer.

The Respondent contends that regardless of the content of the two conversations between Mealy and Dummitt, it nevertheless processed the grievance. According to Dummitt's uncontroverted testimony, he was leaving town and telephoned Karl Williams, at that time president of the Drivers Local of the Respondent. Dummitt asked Williams to process the grievance. Since he could not physically hand the written grievance over to Williams, he read it to Williams. The grievance read as follows:

> On Friday, June 20, 1969, I was unjustly discharged by the Company, Guy's Foods, Inc. I deny the Company's accusations made in their letter of June 18, 1969.[6] I am hereby requesting my reinstatement to my former position with full seniority and all benefits and all lost wages be made whole to me.
>
> .....
>
> /s/ Helen Mealy

Williams' uncontroverted testimony relates that he did not write down the grievance but that on Friday, June 27, he contacted Guy Caldwell, president of the Employer and made an appointment with him. He later went to the Employer's establishment and spoke to Caldwell in person for about 30 to 45 minutes. The reasons for Mealy's discharge were discussed. Caldwell said that Mealy had been warned on a number of occasions for letting nuts and candy run out on the floor; she refused

---

[6] This letter set forth the grounds upon which the Respondent discharged Mealy.

to shut off her machine when the paper ran out although she was ordered to do so by her floorlady. Caldwell said he would be glad to meet and talk over the matter with anyone from the Union but would not put Mealy back to work.

After this conversation, Williams reported back to Dummitt, told the latter of the conversation with Caldwell, and recommended to Dummitt that the grievance had been properly processed and that Caldwell would not rehire Mealy. There is no showing in the record that other than speaking to Caldwell and stating to him the purpose of his visit, Williams did anything in addition to investigate the charges or to in any way suggest alternative methods for dealing with the Mealy matter. Thus, he did not suggest that Mealy be only suspended as a disciplinary measure. Of course, it should be noted, that since Williams did not have physical possession of the grievance he did not present it as written to Caldwell.

The grievance procedure set forth in the bargaining agreement between the Employer and the Respondent requires that the first grievance step was to be made by the individual concerned to the supervisor. If nothing results therefrom, the second step of the grievance procedure is to be taken. This requires that within 7 days of the event, the Respondent present to the Employer a written grievance. It is undisputed that technically the grievance was not presented according to the contract because Williams did not present a written grievance to Caldwell. Williams admitted that he did not write down the grievance as it was read to him over the telephone by Dummitt.

Cladwell also testified and confirmed that to which Williams testified. I therefore find and conclude that the Respondent, through Williams, did at least grieve to the extent that he talked to Caldwell about the discharge of Mealy.

It should be noted, in passing, that the grievance procedure of the collective bargaining agreement between the Respondent and the Employer provides for a third step which may be used to further a grievance. This step provides for arbitration and, furthermore, provides that arbitration may be resorted to if the matter is not settled within 5 days after the grievance is presented in writing. The record is barren of any indication, nor does the Respondent contend, that the Respondent made any effort to proceed with the third step of the grievance procedure.

C. *Concluding Findings*

The Respondent argues that (a) Dummitt did not tell Mealy that the Respondent would not process Mealy's grievance against the employer unless Mealy withdrew the charges she had filed against the employer, (b) that in any event Respondent did process Mealy's grievance and that therefore committed no violation of the Act and (c) that the record is barren of any evidence that part of the reason for Respondent's refusal, if indeed there was a refusal, was Mealy's activity on behalf of the ABC.

With regard to argument (a), I have already found and concluded that on two separate occasions, first at Mealy's home and then during the telephone call to Mealy's place of employment, Dummitt, in so many words, told Mealy that Respondent would not process Mealy's grievance unless Mealy withdrew the charges against the Employer. Counsel for the General Counsel and the Charging Party both contend that this verbal refusal is sufficient restraint and coercion to constitute a violation of Section 8(b)(1)(A) of the Act. I agree.

Assuming, *arguendo,* that the Respondent did, after the verbal refusal to process Mealy's grievance, nevertheless properly process the grievance, there would still be a violation in the initial verbal refusal. It is well established that a Union may not resort to restraint or coercion

in any form for the purpose of restricting the right of an employee member to file charges with the Board.[7] And the Board has the affirmative duty to protect to the outermost limits of the Board's authority the right of employees to file charges.[8]

Since an employee, whether right or wrong, has the right to file charges and to be protected by the Board in doing so, it follows that the Board will protect an employee such as Mealy, who filed charges, from even a bare threat not to process a grievance unless the filed charge against the former employer is withdrawn. This is so because such a threat will naturally not only inhibit the employee who has resorted to the Act's protection but will interdict as well other employees who may learn of the Union's conduct in making the threat.[9]

By reason of the foregoing, it becomes unnecessary to determine whether the Respondent still refuses to process Mealy's grievance, or put another way, whether Respondent has, in fact, failed to properly process the grievance. The Respondent's argument, that in any event, the grievance was processed, and that, therefore, there is no violation is of no avail. Section 8(b)(1)(A) of the Act was violated when Dummitt told Mealy that Respondent would not process the grievance unless Mealy withdrew her charges against the Employer. In any event, the

---

[7] *N.L.R.B.* v. *Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO*, 391 U.S. 418, 424-425; *Local 138 International Union of Operating Engineers, AFL-CIO (Charles S. Skura)*, 148 NLRB 679, 681-682; *Amalgamated Meat Cutters and Butcher Workmen of North America, etc. (National Tea Company)*, 181 NLRB No. 116 at pp. 5-7 of the Trial Examiner's Decision.

[8] *Local 138, International Union of Operating Engineers, AFL-CIO (Charles S. Skura), supra*, at p. 681.

[9] Cf. *Selwyn Shoe Manufacturing Corporation, et al.*, 172 NLRB No. 81 at pp. 8-9 of the Trial Examiner's Decision.

collective bargaining agreement between the Respondent and the Employer would prevent the processing of the grievance at this time, because, as noted above, it provides that the second stage must be processed within 7 days after the grievance has arisen and the third stage of the grievance procedure provides that if the matter is not settled in the second stage within 5 days after presentation of the second stage, the grievance must be submitted to arbitration within 4 days thereafter, and *that time is of the essence.* Accordingly, even assuming the Respondent still has refused to process the grievance, there is no way, at this late date, to remedy this refusal by processing the grievance.

There remains for disposition the issue of whether the refusal of the Respondent to process Mealy's grievance was also motivated by reason of Mealy's sympathy with or activities on behalf of the ABC. The only evidence that the Respondent was aware, or had knowledge of, Mealy's sympathies for the ABC is the testimony of Mealy to the effect that some years before her discharge, at a Board conducted election, Mealy acted as an observer for the ABC. The record establishes that although Mealy's grievance was drafted by a business representative of the ABC and that possibly the business manager of ABC was the one who put through the telephone call from Mealy to Dummitt to apprise Dummitt of her grievance, there is no showing that Dummitt or anyone connected with the Respondent had knowledge of this. Additionally, since the time that Mealy acted as an observer for the ABC at the Board conducted election, Mealy served as a member of a bargaining committee of the Respondent in 1968 and at the time of her discharge was shop steward for the Respondent. Accordingly, I find and conclude that counsel for the General Counsel has failed to establish by a preponderance of the credible evidence that the Respondent had knowledge of any recent activity of Mealy on behalf of the ABC. Therefore, it can-

not be inferred that the Respondent refused to process Mealy's grievance because of her activities on behalf of the ABC. Accordingly, I shall order dismissed that portion of the complaint which alleges that the Respondent refused to process Mealy's grievance because of her activities on behalf of the ABC.

Conclusions of Law

1. Guy's Foods, Inc. is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Association of Packers & Drivers Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By informing Helen Mealy that it would not process her grievance against Guy's Foods, Inc., unless she withdrew her unfair labor practice charge against Guy's Foods, Inc., the Respondent has engaged in, and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

IV. The Remedy

Having found that the Respondent engaged in certain unfair labor practices, it will be recommended that it be ordered to cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Recommended Order

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, and pursuant to Section 10(c) of the Act, it is ordered that As-

sociation of Packers & Drivers Union, its officers, representatives, agents and successors and assigns shall:

1. Cease and desist from:

(a) Denying Helen Mealy, or any other employee similarly situated, fair representation in the processing and handling of her grievances filed pursuant to the Respondent's collective bargaining agreement with Guy's Foods, Inc., by telling or informing Helen Mealy or any other employee that the Respondent will not process any grievance unless the employee withdraw any charges the employee may have filed against Guy's Foods, Inc.

(b) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed in Section 8(b)(1)(A) and Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Post at its business office, hiring halls, and meeting places copies of the attached notice marked "Appendix."[10] Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in con-

---

[10] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes. In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

spicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Mail to the Regional Director for Region 17 signed copies of the attached notice for posting by Guy's Foods, Inc., at its various installations, if the said Company is willing to do so.

(c) Notify the Regional Director for Region 17, in writing, within 20 days from the receipt of this decision, what steps have been taken to comply herewith.[11]

It is further ordered that the complaint herein be, and it hereby is, dismissed insofar as it alleges violations of Section 8(b)(1)(A) of the Act other than those found herein.

Dated at Washington, D. C.

/s/ MORTON D. FRIEDMAN
Morton D. Friedman
Trial Examiner

---

[11] In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 17, in writing, within 10 days from the date of this Order as to what steps the Respondent has taken to comply herewith."

TXD-390-70

APPENDIX

NOTICE
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES
GOVERNMENT

Notice to all members of ASSOCIATION OF PACKERS & DRIVERS UNION.

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT deny Helen Mealy or any employee similarly situated fair representation in the processing and handling of her grievance filed pursuant to the terms of our agreement with GUY'S FOODS, INC., by informing Helen Mealy, or any other employee, that we will not process any grievance unless charges against GUY'S FOODS, INC., are withdrawn.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of rights guaranteed in Section 7 of the Act.

ASSOCIATION OF PACKERS & DRIVERS UNION
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, 610 Federal Building, 601 E. 12th Street, Kansas City, Missouri 64106 (Tel. No. (816) 374-5181).

INDEX

	Page
Question Presented	1
Statement of the Case	2
A. The Facts	2
B. The Court Proceedings Below	3
Argument	5
The Present Case Presents No Important Issue of Federal Law	5
Conclusion	13

CITATIONS

CASES:

Association of Bakers and Drivers (Guy's Foods), 188 NLRB No. 85 (1971)	11
Carey v. *Westinghouse Corp.*, 375 U.S. 261 (1964)	9, 12
Nash v. *Florida Industrial Commission*, 389 U.S. 235 (1967)	9
NLRB v. *Acme Industrial Co.*, 385 U.S. 432 (1967)	9
NLRB v. *C & C Plywood Corp.*, 385 U.S. 421 (1967)	12
NLRB v. *Marine Workers*, 391 U.S. 418 (1968)	9, 11
NLRB v. *Strong*. 393 U.S. 357 (1969)	5, 12
Old Dutch Farms, Inc. v. *Milk Drivers Union*, 359 F.2d 598 (C.A. 2, 1966)	10
Smith v. *Evening News Association*, 371 U.S. 195 (1962)	12
United Steelworkers v. *American Mfg. Co.*, 363 U.S. 564 (1960)	7
United Steelworkers v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960)	7
United Steelworkers v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960)	7, 8
Vulcan Materials Co. v. *United Steelworkers*, 430 F.2d 446 (C.A. 5, 1970)	10
Wilko v. *Swan*, 346 U.S. 427 (1953)	8

MISCELLANEOUS:

National Labor Relations Act, Sec. 203(d)	6
National Labor Relations Act. Sec. 10(a)	6, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1416

CANEL LODGE NO. 700, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner,

v.

UNITED AIRCRAFT CORPORATION, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR RESPONDENT UNITED AIRCRAFT CORPORATION IN OPPOSITION

QUESTION PRESENTED

Whether a Union, representing an employee disciplined for violating Company rules contained in a labor agreement, may avoid the grievance and arbitration procedure to which it has agreed in its contract by bringing the dispute before the National Labor Relations Board.

STATEMENT OF THE CASE

A. The Facts

The Company and the Union[1] have a collective bargaining agreement which provides (Art. IV, para. 3):

> "There shall be no solicitation of employees for union membership or dues conducted upon the premises of the company during working hours by the union, its representatives or by employees." (App. 8a)[2]

The contract also provides (Art. VII, § 1):

> "In the event that a difference arises between the company, the union or any employee concerning the interpretation, application or compliance with the provisions of this agreement, an earnest effort will be made to resolve such difference in accordance with the following procedure which must be followed." (App. 8a-9a).

The contract established a four-step grievance procedure which expressly permits an employee, the Company or the Union to initiate grievances. Grievances by the Company or the Union can be initiated at the third step. Cetrain grievances, including all those concerning the discharge or disciplinary suspension of an employee, if not resolved at the fourth step of the grievance procedure, may then be submitted to binding arbitration at the request of either the Company or the Union (App. 3a-4a, 8a-9a).

On December 30, 1969, the Company suspended shop steward Theodore Tobin for one day for violation of

---

[1] Canel Lodge No. 700, International Association of Machinists and Aerospace Workers, AFL-CIO.

[2] All citations are to the Appendix to the petition for certiorari, unless otherwise indicated.

the Company rule against solicitation. Neither Tobin nor the Union filed a grievance but filed an unfair labor practice charge with the National Labor Relations Board alleging that Tobin's discharge was in violation of the National Labor Relations Act. (App. 4a, 8a).

The Company thereupon filed a grievance and asked for a resolution of the matter under the contract at the third step of the grievance procedure. The Union refused the Company's request for grievance discussions or arbitration. The Union took the position that the issuance of a complaint by the Board's General Counsel on its charge that the Company had violated the Act made the contract arbitration procedure unenforceable (App. 4a, 10a).[3]

The Company then instituted proceedings in the United States District Court under § 301 of the National Labor Relations Act to compel the Union to arbitrate.

B. The Court Proceedings Below

On the above facts, the District Court found that:

> ". . . the plaintiff has presented a grievance cognizable within the terms of the labor agreement; and the Union has a contractual duty to arbitrate the same." (App. 20a).

The District Court rejected the Union's contention that the pendency of proceedings before the National

---

[3] The Trial Examiner and the Board subsequently found that the Company had committed an unfair labor practice by its conduct (App. 40a-52a; Appendix C, Brief of Petitioner).

Labor Relations Board made the agreement to arbitrate unenforceable. The Court pointed out:

> "The arbitration process will not preclude or otherwise limit the Union's right to simultaneously process its statutory grievance before the NLRB. It shall be the Board's prerogative, depending upon the facts and circumstances of the particular case, to exercise its discretion . . . if the facts warrant, to proceed forthwith to a prompt adjudication and enforcement consistent with its statutory responsibilities." (App. 16a-17a).

The Second Circuit Court of Appeals unanimously affirmed. "Only by a completely strained reading of the contract and a completely unrealistic definition of the dispute," said the Court, could it agree with the Union's contention that Tobin's suspension did not fall within the arbitration provisions of the contract. The Court of Appeals, as did the District Court, ruled simply that settled law required "arbitration where under any reasonable construction the contract would cover the grievance . . ." (App. 5a). The Court dismissed the Union's argument that the arbitrator had no authority once the Union resorted to the Board, and rejected the Union's contention that forcing it to proceed to arbitration "penalized" it for using the Board's process. As the Court of Appeals phrased it:

> "This argument is specious, for the [District] court had nothing to do with the execution of the collective bargaining agreement in which the Union undertook to arbitrate. Where there is such an agreement there is concurrent contract and Board jurisdiction." (App. 6a).

ARGUMENT

The Present Case Presents No Important Issue of Federal Law

The petition raises no issue deserving of review.

Rule 19 of the Rules of this Court sets forth the considerations which govern this Court's grant or denial of a petition for certiorari. Petitioner, in attempting to draw itself within the specific categories of controversies which the Court in Rule 19 has agreed to consider, alleges that the decision below "is inconsistent with the decisions of this Court, undermines the national labor policy, and multiplies litigation." (Pet. Br. 12). The latter consideration involving an allegation of multiple litigation, even if true, is not one of the categories under which one may seek review from this Court. Consequently, Petitioner's request for relief rests solely on its claim of conflicts between the decision below and other opinions of this Court and with a "national labor policy."

The petition constitutes a direct assault on two basic principles of labor relations law which are firmly embedded in the decisions of the Court. The one is the principle favoring arbitration of contract disputes. The other is the principle that the authority of the Board and the law of contract are "concurrent regimes, neither preempting the other." *NLRB* v. *Strong,* 393 U.S. 357, 360 (1969).

In demonstrating why the decision below does not involve questions meriting this Court's attention, it is important to note what the Court of Appeals *did not hold.*

Stripped of its elaborate sophistry, petitioner's whole contention comes down to the proposition that

once a party invokes the jurisdiction of the NLRB, the arbitrator's jurisdiction under the contract is ousted. As the court below said, neither a union nor an employer can resist contract arbitration because it prefers the NLRB as a forum. Where there is an agreement to arbitrate, jurisdiction is concurrent.

The court below in no way limited the right of the Union to pursue its remedies before the National Labor Relations Board. There has been no attempt to dictate to the Board what it should or should not do. The Court has left this entirely in the Board's hands. As the Court of Appeals made clear:

> "This case does not present as issues when or to what extent the Board should defer to an arbitrator's decision, nor does it present as an issue when the Board should postpone its own proceeding until the conclusion of contract arbitration .... It presents only the propriety of the district court's order enforcing an arbitration agreement at a time when a dispute arising out of the same facts is pending before the Board." (App. 6a-7a).

Petitioner has not otherwise defined the "national labor policy" it feels has been "undermined" by the Second Circuit Court of Appeals. Petitioner does advert, however, to two sections of the National Labor Relations Act, § 203(d) and § 10(a), which it contends the Court of Appeals misconstrued. But this allegation is without merit. Section 203(d), in fact, declares that:

> "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

This section suggests, if it suggests anything which is pertinent here, that preference should be given to the arbitral process. The decision below is in total harmony with that Section of the Act.

Section 10(a) empowers the Board to prevent the commission of unfair labor practices. The opinion below, as noted above, in no way interferes with the Board's exercise of its statutory powers.

Despite Petitioner's protestations to the contrary, this case involves an unexceptional interpretation of the contract between these parties under Section 301 of the Act ruling in favor of the arbitrability of a particular dispute. The ruling is in complete harmony with, and in truth required by, the ruling of this Court in the Arbitration Trilogy[4] that:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582-583.

This case presented the Court with the simple issue of whether the inclusive rule enunciated in the Arbitration Trilogy should be applied to the contract and grievance involved in this case. The Court ruled in favor of arbitrability. It could hardly have ruled otherwise since there is an express clause in the contract governing union solicitation during working hours, and the issue to be arbitrated was the applica-

---

[4] *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

tion of this clause to a particular case. This decision was in every respect faithful to the principles which the Court has established for determining the arbitrability of contract disputes.

Petitioner suggests that the underlying decision is in conflict with this Court's decision in *Wilko* v. *Swan,* 346 U.S. 427 (1953) and decisions of this Court requiring free access to Board processes (Pet. Br. p. 15). There is no such conflict. *Wilko* v. *Swan* dealt with the right of a brokerage house to stay a suit at law brought by a customer for misrepresentation on the ground that the customer, in the margin agreements, had agreed to arbitrate any dispute arising out of the transaction. The Securities Act had a provision, resembling nothing in the present litigation, specifically forbidding the waiver of any of its provisions by stipulation. This Court held that the customer's agreement to arbitrate was akin to a "stipulation" forbidden by the Act. (346 U.S. at 433-435.) There is no suit here to stay the processing of the Union's complaint before the NLRB. Petitioner, moreover, overlooks the fact that in *United Steelworkers* v. *Warrior & Gulf Nav. Co., supra,* this Court specifically found that the *Wilko* line of cases involving commercial arbitration as a substitute for litigation were "irrelevant" to the issue of arbitrability in labor-management disputes. The Court said:

> "Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here." 363 U.S. at 578.

Petitioner seeks to revive the *Wilko* rule and apply it to a labor arbitration on the bare assertion that

arbitration was not sought in this case as a substitute for industrial strife (Pet. Br. p. 15). Arbitration, where it is an agreed upon method of resolving industrial disputes, is always an available substitute for industrial strife, and recourse to the arbitration procedure has been strongly encouraged by the Court.

The Petitioner theorizes, however, that the "avowed purpose" of the Company's invocation of arbitration was to utilize it as a substitute for the NLRB proceedings. But it is not within the power of the employer here to oust the Board of jurisdiction. Whatever the subjective purpose of a party in seeking arbitration, the law is clear that resort to arbitration does not operate to oust the Board from jurisdiction or stay Board proceedings. *Carey* v. *Westinghouse Corp.,* 375 U.S. 261 (1964). That power rests exclusively with the Board. The present case is eloquent testimony to this rule. Despite the pendency of the arbitration case and the action of the courts below in ordering arbitration, the Board has continued to process the unfair labor practice case.

Petitioner's citation of cases such as *Nash* v. *Florida Industrial Commission,* 389 U.S. 235 (1967), *NLRB* v. *Marine Workers,* 391 U.S. 418 (1968), and *NLRB* v. *Acme Industrial Co.,* 385 U.S. 432 (1967) (Pet. Br. p. 17-18) misses the mark. *Acme Industrial* involved the refusal of a lower Court to enforce a Board order until appellant had completed arbitration. *Nash* involved a state's refusal to grant unemployment benefits to an employee who had filed an unfair labor practice charge with the Board. *Marine Workers* concerned union penalties against a member who filed Board charges. Manifestly, none of these cases is in conflict with the decision here which holds that a party which

voluntarily agrees to arbitration must arbitrate an issue concerning the interpretation or application of his contract, whether or not such party concurrently invokes the process of the NLRB.

Petitioner also suggests that the decision below conflicts with the decision of the Fifth Circuit Court of Appeals in *Vulcan Materials Co.* v. *United Steelworkers,* 430 F.2d 446 (1970), (Pet. Br. p. 17). Petitioner again misreads the authority on which it relies. *Vulcan* dealt with a successful damage suit under § 303 of the National Labor Relations Act arising out of tortious secondary boycott conduct of the Union. The Court refused to order the Company to arbitrate the matter rather than pursue its statutory remedy under § 303, because the strong national labor policy favoring arbitration "concerning the interpretation or application of [collective bargaining] agreements" does not apply to a § 303 suit concerning damages, "matters to which the expertise of labor arbitrators does not necessarily extend." *Old Dutch Farms, Inc.* v. *Milk Drivers Union,* 359 F.2d 598, 602 (C.A. 2, 1966) (adopted by the Court in *Vulcan Materials*).[5] *Vulcan* thus involved an interpretation of one of the most complex provisions of the Act (secondary boycotts) whereas here it primarily involves interpretation of an express contract provision, which is the traditional grist of an arbitrator's opinion.

Petitioner makes the startling claim that enforcement of its own voluntary agreement to arbitrate, in some unexplained fashion, constitutes an impediment to its free access to the Board (Pet. Br., pp. 17-18).

---

[5] The District Court also expressly rejected the same argument advanced by petitioners in that forum (App. 18a).

The claim flies in the face of the obvious fact that access to the Board by the Union has *not in any way been impeded* in this case. Petitioner's reliance on *NLRB* v. *Marine Workers,* 391 U.S. 418, to establish an impediment to its access to the Board is grossly inapposite. In that case, the Court ruled that a Union may not discipline a member under its own internal rules for filing a charge with the Board.[6]

In the present case, the only so-called "penalty" imposed on petitioner is that it adhere to its agreement to arbitrate. The "penalty" is thus not only self imposed, but in reality constituted no bar to the concurrent prosecution of the unfair labor practice charges before the NLRB. The court below correctly perceived that:

> "This argument is specious, for the court had nothing to do with the execution of the collective bargaining agreement in which the Union undertook to arbitrate. Where there is such an agreement there is concurrent contract and Board jurisdiction." (App. 6a)

And, as stated by the District Court, the end result of the Petitioner's restrictive construction of Section 301:

> "would mean that the Union, in its exclusive discretion could evade, at will, the contract arbitra-

---

[6] The case cited by petitioner in its Supplemental Memorandum, *Association of Bakers and Drivers (Guy's Foods),* 188 NLRB No. 85 (1971), is merely an extension of the rule enunciated in *The Marine & Shipbuilding* case to the factual circumstance where a Union requires an employee to drop his unfair labor practice charge with the NLRB as the price for prosecuting his grievance under the contract. In both cases, a union-imposed penalty was exacted preventing access to the Board. The decision of the Court below in no way prevents access to Board processes.

> tion process by deliberately refraining from submitting the alleged grievance . . . and then filing its complaint with the Board." (App. 15a).

But, as stated at the outset, the long and short of it is that the petition runs squarely into *Warrior & Gulf* as well as the rule of concurrent jurisdiction as between the courts under Section 301 and the NLRB. The principle has been recently restated by this Court:

> ". . . [I]it has been made clear that in some circumstances the authority of the Board and the law of contract are overlapping, concurrent regimes, neither pre-empting the other." *NLRB* v. *Strong,* 393 U.S. 357, 360 (1969)

The "circumstances" to which this Court referred are situations when actions are both an alleged violation of contract, remedial under § 301, and simultaneously alleged unfair labor practices. See also *Carey* v. *Westinghouse,* 375 U.S. 261, 268-272 (1964); *Smith* v. *Evening News Association,* 371 U.S. 195, 196-197 (1962). Compare *NLRB* v. *C & C Plywood Corp.,* 385 U.S. 421, 426-428 (1967).

Petitioner's claim comes down to the transparent proposition that, once it has selected its favored forum, that choice is binding on the employer and recourse to the agreed-upon contract forum is cut off. Presumably, the argument is that the contract arbitration procedures are unenforceable because they permit the arbitrator to invade the province of the Board. But, as the court below held, this contention has long since been foreclosed by the decisions of this Court.

CONCLUSION

Since the present case involves no conflict with the decisions of this Court or with any decisions of the circuit courts, and is merely another judicial ruling favoring the arbitrability of a particular dispute under a particular collective bargaining agreement in complete harmony with this Court's Arbitration Trilogy, there is presented no important issue of Federal law which has not been, but should be, decided by this Court. Hence, the petition should be denied.

Respectfully submitted,

JOSEPH C. WELLS
1225 Connecticut Avenue, N. W.
Washington, D. C. 20036

GUY FARMER
Patterson, Belknap, Farmer & Shibley
1120 Connecticut Avenue, N. W.
Washington, D. C. 20036

Counsel for Respondent